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ABSTRACT

This manual has been prepared to assist legal services lawyers who are representing students whose rights have been curtailed or violated by school authorities. The manual will assist a lawyer in identifying the best legal theory for the case, the judicial precedent, and suggested language for pleadings. Following a brief introduction in Section I, Section II deals with legal theories which might be useful when no federal constitutional right is clearly involved. Sections III and IV, which comprise the major portion of the publication, deal with the substantive and procedural rights of students under the United States Constitution. Section III discusses students' rights under the first, fourth, and fourteenth amendments, the general approach to equal protection problems, and invasions of the student's personal life. Section IV includes a copy of Goss v Lopez, the landmark Supreme Court decision dealing with short-term suspensions and an analysis of Goss. Section V also deals with substantive considerations when analyzing more esoteric behavior control methods employed by school authorities. Section VI lists the remedies that courts have granted in various student rights cases, including damages. Part VII analyzes the legal theories available to students in private schools. An appendix contains examples of typical language used in pleadings. (Author/RM)

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The Constitutional Rights of Students

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I. Introduction

I. Introduction

Philosophy of Manual

This manual has been prepared to assist legal services lawyers who are representing students whose rights have been curtailed or violated by school authorities.

The staff preparing this manual, because it is located at the Center for Law and Education, typically hears of the worst cases -- that is, the worst examples of school official excesses and arbitrariness. Thus, it is possible that implicit in these writings is an assumption that students usually act in good faith and are pursuing constitutionally protected rights, while school officials often act arbitrarily or repressively. We recognize that in most situations the facts are not quite that simple, and we leave it to the lawyer who is reviewing an actual complaint to determine whether or not there was a violation of the student's rights. Sometimes, it will be the lawyer's function to advise the student that he or she acted excessively, and that the law offers no protection. If, however, our underlying assumptions are in harmony with the fact situation before the lawyer, then this manual will assist in identifying the best legal theory for the case, the judicial precedent, and suggested language for pleadings.

Scope of Manual

This manual deals with students' first amendment rights, their rights in disciplinary cases, and some non-disciplinary problems arising under the equal protection clause.* Parts I through VI are limited to cases arising in public schools and state-operated universities. The most important material -- from the standpoint of numbers of problems which arise in legal services offices -- are dealt with in Parts III and IV, covering the substantive and procedural rights of students under the United States Constitution.

Part III has four major subdivisions: III(A) deals with students' rights under the

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*Throughout this manual cases involving students in high schools, colleges and universities are treated as essentially the same. The basic rights are the same, and the institutional needs are the same. Moreover, there are hardly any cases where the decision has turned on the age and status of the student. On a few occasions courts have commented that the rule might have been different in another setting. Special considerations for more youthful audiences in obscenity cases are alluded to in Part III(A)(2), for example. Sometimes, too, more youthful age might require more stringent safeguards of procedural due process, requiring, for example, a right to counsel in a greater number of situations. As the federal district court said in the *Sullivan* case, "the high school student perhaps even more than the university student needs careful adherence to concepts of procedural fairness and reasonableness by school officials." *Sullivan v. Houston Ind. Sch. Dist.*, 307 F.Supp. 1328, 1343 (S.D. Tex. 1969) *approved in* 475 F.2d 1071 (5th Cir. 1973). One decision which held that summary suspension of high school students could be tolerated where they would not be for university students was vacated by the Supreme Court and implicitly overruled in *Goss*. See *Banks v. Board of Public Instr.*, 314 F.Supp. 285, 291-93 (S.D. Fla. 1970), *vacated on other grounds*, 401 U.S. 988 (1971). Compare with *Goss v. Lopez*, 419 U.S. 565 (1975). Finally, the case of *Breen v. Kahl*, 296 F.Supp. 702, 706 (W.D. Wis. 1969), *affirmed*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970), is pertinent. The court rejected school officials' arguments that students should be treated differently than adults because of their age, and invalidated school hair regulations. The court said, *id.* at 707:

> But it must not be forgotten, however small the community, however familiar to one another the characters in the drama, that when a school board undertakes to expel a public school student, it is undertaking to apply the terrible organized force of the state, just as surely as it is applied by the police, the courts, the prison warden, or the militia.

For the most part, then, there seems to be no good reason for differentiating between the rights of high school and college students. For a discussion of the only cases found where age did seem to operate against a student, see *infra* at pp. 213-15 (dormitory living requirements). See also *infra* at p. 49, 51 (standards in obscenity cases and similar cases), and *infra* at pp. 176-77 (equal protection cases).

first amendment, and contains six separate notes on various topics concerning first amendment problems. Part III(B) deals with the student's right to privacy under the fourth and fourteenth amendments. This part is concerned with locker, dormitory, and personal searches. Other invasions of the personal sphere are discussed under Part III(D) (Substantive Due Process) -- the right to determine one's appearance, the right to be free of school regulation when off campus, the right to be apprised of school rules before a situation arises in which they might be broken (which appears in the note in Vagueness). These have been grouped together in a separate part on substantive due process because none are specifically covered by any one amendment to the constitution. For example, we considered the grooming cases, which involve an open and public act, as not really "privacy" issues as they are frequently classified, but a right derived from the first, fourth, ninth, and fourteenth amendments. It is perhaps better characterized as a "right to self-determination." Part III(C) discusses the general approach to equal protection problems, and provides a series of examples -- sex discrimination, race discrimination in disciplinary actions, and the like. It does not cover the subject of school desegregation decisions, which is too vast and specialized an area for treatment here. The Center has been involved in desegregation cases and is able to offer assistance to legal services lawyers in that area. This section also does not cover problems of classification and tracking, which are treated in the manual, CLASSIFICATION MATERIALS (revised ed. Sept., 1973) which is available from the Center. Part III(C) also discusses the equal protection problems created by requiring girls to take home economics courses and excluding them from interscholastic athletic competition.

Part IV, another major part, deals with procedural due process. It includes a copy of Goss v. Lopez, the landmark Supreme Court decision dealing with short term suspensions, the plaintiff's brief filed with the High Court, and our analysis of Goss. In addition, there is the most comprehensive listing to date of lower court decisions dealing with individual elements of due process required for more severe punishment.

Part II -- Inherent Limits on School System Authority -- deals with the legal theories which might be useful when no federal constitutional right is clearly involved. It discusses rules created primarily by state courts interpreting implicit state constitutional requirements that school officials only act when authorized to do so -- an argument which closely parallels arguments to be made when pursuing "substantive due process" rights. Part V deals with punishments generally, including substantive arguments for invalidating certain kinds of punishment altogether. Part V also deals with substantive considerations when analyzing more esoteric behavior control methods employed by school authorities -- primarily the administration of behavior modification drugs to students and the use of psychological testing. Part VI lists the remedies that courts have granted in various student rights cases, including damages. The landmark case of Wood v. Strickland, decided by the Supreme Court this year, is reproduced here. Part VII analyzes the legal theories available to a student enrolled in a privately operated school or university. Finally, there is an appendix containing numerous examples of typical language used in pleadings.

This manual has been prepared primarily to aid in writing complaints for federal litigation and briefs; it will also be useful as a guide to fashioning relief, whether agreed upon by the parties or ordered by the court, wherever there is a desire to follow judicial precedent. The manual does not attempt to provide assistance in choices between federal or state courts, judicial rules related to abstention, jurisdiction, and the like, tactics, pre-trial or trial problems of discovery, evidence, and similar matters. Legal services lawyers faced with such problems are invited to call us for consultation; they might also consult materials prepared by the Legal Services Training Program. This manual does not analyze student rights originating in state constitutions and state legislation. We have collected some material in this area and, again, the legal services lawyer should contact us for assistance. The lawyer should also consult local statutes and cases if a state legal theory seems more promising. Finally, of course, the federal cases cited here are valid in state courts, which are bound to follow the federal constitution. We also frequently cite state cases, but for practical reasons these references are not as thorough or complete as our references to federal cases.

Other Center Publications

This manual supercedes our prior publication on student rights, the STUDENT RIGHTS LITIGATION PACKET, which is out-of-date. Those familiar with that publication will note that there is virtually no overlap between the two publications. Indeed, judicial interpretation of constitutional requirements in student cases has proliferated and become much more sophisticated than it was at the time the prior publication was issued. In addition, a number of important decisions have come down from the Supreme Court which promise to permeate all legal disputes between students and schools in the general areas covered in this manual. The reader is advised to destroy the earlier packet, or indicate on the cover that it is obsolete.

This manual can be kept up-to-date by consulting the EDUCATION LAW BULLETIN, distributed by the Center every six to eight weeks, which contains case summaries in over fifty areas of education law. At least one copy of the BULLETIN is sent routinely to each legal services office and back-up center.*

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*Editor's postscript: Issue no. 4 of the ED.L.BULL. was published prior to the printing of this manual. Supreme Court decisions have been inserted into the text. Others are noted here:

Thonen v. Jenkins, cited infra at pp. 48, 55 & 67, reheard and appealed on issue of damages and attorney's fees. Infra at p. 351; ED.L.BULL. 87.

Carnes v. Kentucky, cited infra at p. 158 resulted in summary judgment for defendants at district court level. ED.L.BULL. 97. This decision is being appealed.

Zeller v. Donegal Sch. Dist. Bd. of Educ. modifies the third circuit rule in hair cases as stated infra at p. 207. ED.L.BULL. 108.

(postscript continued on p.6)

Citations and Form

The notes written specifically for this manual generally follow the style most lawyers use in brief writing. That is, citations are included in the text and few footnotes are used. Infra and supra are seldom used on the assumption that some lawyers may borrow select passages for their briefs, and will not necessarily be using the passage where a case was first cited. Also, to facilitate incorporation into briefs, different subject matter often begins on a new page.

The material which was written or revised especially for this volume will be signed and dated at the end of each section by the author; the date indicates the point at which cases were finally shepardized to determine whether appellate review had taken place.

As a general rule we are following the form recommended in A UNIFORM SYSTEM OF CITATION, (11th ed., 1973) except that we deviate because we are not typesetting this manual (e.g., what should be in italics is underlined, and what should be in large and small capital letters is in uniform-sized capital letters). It should be noted that the UNIFORM SYSTEM OF CITATIONS requires that where a case is appealed in the same year, only the appellate court date is indicated. Thus, dates are sometimes deleted under this rule. We also developed additional rules on abbreviations of case names.

P.M. Lines, Manual Editor
Center for Law and Education
August 29, 1975

(postscript continued from p.4)

Greenhill v. Bailey, cited at p. 222, was reversed. ED.L.BULL. 109.

Wood v. Strickland, cited at pp. 224, 231, 235 & 249, designated as Strickland v. Inlow on remand, resulted in a circuit court finding that due process was violated, and a remand to district court for further proceedings on the question of damages and defendants' immunity. ED.L.BULL. 109. Note circuit court held subsequent hearing did not cure defects of first.

Sweet v. Childs, cited at p. 224, was re-affirmed in the light of Goss. ED.L.BULL. 110.

Several new cases have also come down. See Dixon v. Youngstown City Bd. of Educ., ED.L.BULL. 85-86 (Ohio corporal punishment statute voided)(see infra at pp. 323-38); Futrell v. Ahrens, ED.L.BULL. 94 (upholding rule restricting visits from opposite sex in dormitory rooms)(see pp. 213-16, infra); Stevenson v. Board of Regents (judgment against a doctoral candidate who failed qualifying examination), ED.L.BULL. 98 (see p. 222, infra); Bailey v. Lloyd (upholding higher fees for non-residents), ED.L.BULL. 99 (see p. 177, infra); Vorcheimer v. School Dist. of Philadelphia (denying presence of sex discrimination in sex segregated schools), ED.L.BULL. 100 (see p. 161, infra); Berrios v. Inter American Univ. (state action issue), ED.L.BULL. 106-07 (see pp. 365-74, infra); Slaughter v. Brigham Young Univ. (same); Braden v. Univ. of Pittsburgh (same); Mitchell v. King (vagueness) ED.L.BULL. 112 (see pp. 193-206, infra); Dorsey v. Bale (grade reduction as a punishment was found to be ultra vires), ED.L.BULL. 115 (see infra p. 12, 339-41).

II.

Inherent Limits on School System Authority

II. Inherent Limits on School System Authority

Introduction

Some problems do not lend themselves easily to a traditional constitutional analysis. This occurs where (1) the student was not attempting to pursue a right under the first amendment; (2) there is no right to privacy as the student's misconduct was shamelessly public; (3) there is no question of a denial of equal protection because all students in comparable circumstances are treated equally badly; and (4) there is contrary or no direct precedent under the due process clause. Such are the cases where school officials have attempted to suspend a student for shenanigans away from the school premises and during non-school hours. Or school officials have attempted to control a student's more personal life by disciplining the student for matters which have nothing to do with his or her status as a student -- *e.g.*, marriage, non-marital liaisons, pregnancy and parenthood. Or the school has a valid basis for punishing a student but has chosen a punishment that far exceeds the wrong committed -- such as expulsion for breaking a window, or corporal punishment for littering on school grounds.

In these situations, a "nonconstitutional" analysis[*] might offer the best theory for a lawsuit. The central issue in such an analysis is whether school officials are acting within the scope of their authority. School officials, like any other local governmental officials, may only do that which the state has authorized them to do. If there is no statute which expressly or impliedly authorizes the school board to act, they are ultra vires -- beyond the scope of their authority. Likewise, principals, teachers, other staff and non-school persons should be acting pursuant to some clear authorization from the school board, and the act of these subordinates must be an act which the school board has authority to delegate to others. Finally, if the act is not authorized by the legislature, the school may still attempt to justify it on the basis of the doctrine of *in loco parentis*, which presumes that parents have delegated their responsibility and authority over their kids when they place the kids in school. As will be discussed below, both of these doctrines are ancient, but while the ultra vires rule remains in harmony with changing conditions, the *in loco parentis* rule does not.

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[*] See Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis", 117 U. PENN L. REV. 373 (1969)

In Loco Parentis

Under the in loco parentis doctrine, school officials may take whatever disciplinary action parents might take. The rule -- resting on a presumption that parents have delegated their authority to school officials -- is of doubtful validity in public school systems in today's context. It was developed prior to the advent of compulsory education laws, in a day when parents voluntarily placed a child in school. See Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis", 117 U. PENN. L. REV. 373, 425-26 (1969). Today when both parents and child are compelled to utilize the public school system (or pay for an acceptable alternative), there should be no presumptions of implied consent to disciplinary procedures or punishments: " . . . . the doctrine is of little use in dealing with our modern 'student right' problems." Zanders v. Louisiana State Bd. of Educ., 281 F.Supp. 747, 756 (W.D. La. 1968)(college case).

In any case, where the parents express their disapproval of school rules or procedures, the school should be absolutely precluded from citing in loco parentis as the source of its authority. Breen v. Kahl, 419 F.2d 1034, 1037-38 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970):

> Since the students' parents agree with their children that their hair can be worn long . . . , in the absence of any showing of disruption, the doctrine of "in loco parentis" has no applicability.

See also Glaser v. Marietta, 351 F.Supp. 555 (W.D. Pa. 1972) (corporal punishment); State ex. rel. Bowe v. Board of Educ. of Fond du Lac, 63 Wis. 234, 23 N.W. 102 (1885)(suspension for refusal to carry firewood).

Because of the age and maturity of university students, courts have also found the in loco parentis doctrine "no longer tenable" as applied to them. Buttny v. Smiley, 281 F.Supp. 280, 286 (D. Col. 1968).

Finally, in jurisdictions where the in loco parentis doctrine is nonetheless accepted, the school may still exceed the scope of this presumed authority by acting in bad faith or unreasonably:

> . . . there must be no malice and there must be reasonable grounds and the punishment must not be excessive, but commensurate only with the offense.

Marlar v. Bill, 181 Tenn. 100, 178 S.W.2d 634, 635 (1944). See also Johnson v. Horace Mann Mutual Insurance Co., 241 So.2d 588 (La.Ct.App. 1970)(corporal punishment "excessive and unreasonable"): Guerrieri v. Tyson, 147 Pa. Super. 24 A.2d 468, 239 (1942)(damages for treatment of infected finger by scalding); Phillips v. Johns, 12 Tenn.App. 354 (1930)(damages for wrongful search); Axtell v. LaPenna, 323 F.Supp. 1077 (W.D.Pa. 1971)(suspension for long hair).

In general, the in loco parentis doctrine has fallen into disuse, as it should. Where it is cited in the decisions, it is usually in dicta, the court having decided the case on other bases. Thus, the real source of school authority is to be found in state law.

The Ultra Vires Doctrine

It is a universal truism that legislatures legislate. This power is given to them by federal or state constitutions. Courts have prudently interpreted that to require that only legislatures legislate. The administrative branch executes the task which the legislation specifies for it.

The rule that an agency may do only that which the legislature has authorized can be traced to state or federal constitutional provisions assigning specific, separate powers to the legislative and administrative branches of government, and to a general need to assure democratic control of the administrative branches of governments. Its rationale and definition is straightforward:

> . . . [A]ll administrative authority is conferred (directly or by implication) by a statute. Thus at the outset, the legislature perforce exercises some degree of control, because in enacting the statute the legislature must, in broad outline at least, define the field in which the agency will operate and must state the objective sought to be accomplished. Administrative action clearly outside the delegated field or not designed to achieve the legislative objective would, in an appropriate judicial proceeding, be held invalid as being outside the power delegated. Legislature and judiciary here combine to prevent the administrative agency from acting ultra vires.

GELHORN AND BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS (6th ed. 1974) at 58. See also Board of Directors of the Indep. Sch. Dist. of Waterloo, Ia. v. Green, 259 Ia. 1260, 147 N.W.2d 854 (1967); Coggins v. Board of Educ. of City of Durham, 223 N.C.763, 28 S.E.2d 527 (1944); Alexander v. Thompson, 313 F.Supp. 1389, 1397 (C.D.Cal. 1970); and Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis", 117 U. PENN. L. REV. 373 (1969).

This doctrine applies in the school context. Grigsby v. King, 202 Cal. 299, 260 P. 789, 791 (1927):

> [A] board of school trustees . . . is merely an administrative agency created by statute and invested only with the powers expressly conferred, subject to the limitations thereto attached by the Legislature.

See also Paterson v. Board of Trustees, 157 Cal. App.2d 811, 321 P.2d 825 (Dist.Ct.App. 1958); Cf., Elder v. Anderson, 205 Cal. App.2d 326, 23 Cal. Rptr. 48, 52 (Dist.Ct.App. 1962).

Indeed it has long been established that an administrative or ministerial agency --

> . . . may not "vary or enlarge the terms or conditions of [the] legislative enactment," . . . or "compel that to be done which lies without the scope of the statute."

Knudsen Creamery Co. v. Brock, 37 Cal.2d 485, 492-93, 234 P.2d 26 (1951).

Another form of the ultra vires rule specifically applies to elected governments which are subdivisions of the state. This form of the rule is generally known as Dillon's rule, after the treatise writer who formulated it.

> The authority of municipalities to enact particular ordinances must be (1) expressly granted, or (2) clearly implied as necessarily incident to the powers expressly granted, or (3) indispensible to the purposes for which municipalities are created . . . .

DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, SEC. 89 (1st ed. 1890). See also 2 McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, SECS. 4.01-4.05 (1966, Supp. 1974).

This doctrine should not be confused with other constitutional limitations on school authorities. A school rule might be permissible under the constitution, but it can still be invalid if the state legislature has not delegated power to school officials to pass the rule. For example, legislatures might prohibit membership in fraternal organizations by statute, Waugh v. Board of Trustees, 237 U.S. 589 (1915), or expressly delegate this authority, Hughes v. Caddo Parish Sch. Bd., 57 F.Supp. 508 (W.D.La. 1945), aff'd, 323 U.S. 685 (1945), but school boards, in the absence of an express law, may not. Wright v. Board of Educ., 295 Mo. 466, 246 S.W. 43 (1922) But see Coggins v. Board of Educ., 223 N.C. 763, 28 S.E.2d 527 (1944).

In other words, there are some school regulations which may withstand a challenge under the bill of rights, but only if they clearly emanate from the state legislature. As the court said in Alexander v. Thompson, 313 F.Supp. 1389, 1396-97 (C.D.Cal. 1970):

> If the California Legislature within constitutional limits deems student dress and appearance a proper subject for public policy pronouncements and appropriate regulation, it has an obligation to say so and establish a uniform standard applicable to all school districts.

The Court in Alexander observed that the rule in question (barring sideburns) could not be implied from a general delegation of educational authority because it had no relation to the legitimate educational function of the school. After a temporary restraining order the court abstained from final adjudication, retained jurisdiction and turned the matter over to the state courts. Accord on the substantive issue, Neuhaus v. Federico, 12 Or.App. 314, 505 P.2d 939 (1973).

Until the 1930's, the judiciary took a narrow view of the scope of any government's authority. This meant that the courts would strictly construe a school district's statutory authority. See e.g., Mathews v. Board of Educ., 127 Mich. 530, 86 N.W. 1036 (1901)(striking down a school board requirement making vaccination a prerequisite to attending school in the absence of express statutory authority); Rhea v. Board of Educ., 41 N.D. 449, 171 N.W. 103 (1919)(same); but cf. Johnson v. Dallas, 291 S.W. 972 (Tex. Civ. App. 1927).

The ultra vires principle remains a sound doctrine today, and may be entering a period of revival. Although courts today are more willing to imply specific authority from general statutes, ultra vires may be a useful ground for objecting to certain school rules. For example, although not necessarily unconstitutional, it would be beyond the authority of the school board to attempt to regulate conduct of students in places and at times which are totally unrelated to school activities.

REGULATION OF OFF-CAMPUS CONDUCT ULTRA VIRES

Legislatures do not normally give school officials the authority which they might to municipalities to police unlawful acts taking place outside of school. As stated in dicta in a 1967 case in Iowa:

> . . . it is not within their power to govern or control the individual conduct of students *wholly* outside the school room or playgrounds. However, the conduct of pupils which directly relates to and affects management of the school and its efficiency is a matter within the sphere of regulations by school authorities.

Board of Directors v. Green, 259 Ia. 1260, 147 N.W.2d 854, 858 (1967). However, the court permitted the school board to maintain a rule which barred married students from participation in extracurricular activities.

In effect, the ultra vires doctrine gives students a right to be free of school discipline for off-campus activities which have no relationship to school. If school officials are upset by something a student has done when beyond their official reach, they should handle the matter just as they would if an adult had committed the act. That is, they should complain to the police or sue the student for tort, libel, trespass, or whatever is appropriate.

Thus, the court in *Howard v. Clark* held that the school district exceeded its authority when it suspended students for being criminally charged with possession of heroin off school grounds. 59 Misc.2d 327, 299 N.Y.S.2d 65 (Sup.Ct. 1969). The court limited suspensions to reasons enumerated by statute, rejecting the district's argument that it gave it any implied suspension powers. *Cf.*, *Taylor v. Grisham*, Civil No. A-75-CA-13 (W.D. Tex., Feb. 24, 1975) (Clearinghouse Review No. 15,925) (preliminary relief ordered on substantive due process grounds reinstating student suspended for off-campus marijuana use).

Accordingly, restrictions on students' social activities are usually deemed ultra vires. *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. R. 343 (1877) (dicta): *State v. Osborne*, 32 Mo. App. 536 (1888); *but see Mangum v. Keith*, 147 Ga. 605, 95 S.E. 1 (1918) (permitting such restrictions where they are confined to that which could be necessary to assure performance of studies).

In a recent case, the court has found a student's off-campus drinking habits to be beyond the reach of school authority. *Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555 (Iowa 1972). *Bunger* is an example of the validity of the ultra vires argument in today's context. *But see McLean Ind. Sch. Dist. v. Andrews*, 333 S.W.2d 886 (Tex.Civ.App. 1960) (regulation of student driving car to school); *O'Rourke v. Walker*, 102 Conn. 130, 128 A.25 (1925) (punishment of students for harrassing students on the way home from school); *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156 (1859) (punishing students for calling teacher names after school hours).

Similarly, a state court once struck down punishment to enforce requirements of homework. *Hobbs v. Germany*, 94 Miss. 469, 49 So. 515 (Sup.Ct. 1909), *but see Balding v. State*, 23 Tex. App. 172, 4 S.W. 579 (1887).

Frequently, school officials become interested in off-campus activity because an outspoken student is criticizing the school system. Here either the first amendment or an ultra vires argument should suffice to protect the student from school interference. Thus, the court in Sullivan v. Houston Ind. School Dist., 307 F.Supp. 1328, 1340, 1345 n.1 (S.D. Tex. 1969), informally approved, 475 F.2d 1071 (5th Cir. 1973), held that the off-campus distribution of an underground paper was simply not within the reach of the school board.

REGULATING STUDENTS' PERSONAL LIVES

Ultra vires arguments have also prevailed (although not always as the sole ground) in overruling school system attempts to regulate the personal lives of students. Thus, in Alvin Indep. School Dist. v. Cooper, 404 S.W. 2d 76 (Tex. Civ. App. 1966) the court cited the doctrine and reinstated a married girl who had been excluded from school for being a mother.

Although they did not specifically cite the ultra vires doctrine, there are a number of other state cases similar in facts and result to Cooper. Carollton-Farmers Branch Ind. School Dist. v. Knight, 418 S.W. 2d 535 (Tex. Civ. App. 1967); Anderson v. Canyon Ind. School Dist., 412 S.W.2d 387 (Tex. Civ. App. 1967); Board of Educ. of Harrodsburg v. Bentley, 383 S.W.2d 677 (Ky. Ct. App. 1964); McLeod v. State ex. rel. Colmer, 154 Miss. 468, 122 So. 737, (1929); Nutt v. Bd. of Educ. of Goodland, 128 Kan. 507, 278 P. 1065, (1929). But see State ex. rel. Thompson v. Marion County Bd. of Educ., 202 Tenn. 29, 302 S.W.2d 57 (1957). In these cases the courts did not specifically rely on the ultra vires doctrine, but ruled that the suspensions or exclusions were an abuse of statutory authority, finding the action in conflict with statutory and constitutional guarantees of education for all children and not specifically authorized by any statute. Generally the court used a "reasonableness" test.

See also Alexander v. Thompson, 313 F.Supp. 1389, 1396-97 (C.D. Cal. 1970) (grooming code ultra vires) (discussed at pp. 9-10, supra); Neuhaus v. Federico, 12 Or. App. 314, 505 P.2d 939 (1973) (same).

PUNISHMENTS FOUND ULTRA VIRES

In Dorsey v. Bale, 521 S.W.2d 76 (Ky.App.Ct. 1975) the court held that academic punishments were ultra vires. School regulations called for reduction of grades upon any unexcused absences, including those caused by a suspension. The plaintiff's grades were reduced by five percentage points for each of the four days he was suspended, resulting in a reduction of one letter grade in three of his five courses. The court held that such action was ultra vires under a state statute which authorized suspensions and was silent on academic punishments.

Excessive punishment could also be deemed ultra vires, even if the school rule was itself valid. For example, in a state where the law required a flag salute in school, the court refused to permit school authorities to expel children for failure to comply, because the law provided no specific punishment. *Commonwealth v. Johnson*, 309 Mass. 476, 35 N.E.2d 801 (1941). This court found it unnecessary to consider the constitutional questions. Sometime later, of course, the Supreme Court of the United States found compulsory flag salutes unconstitutional. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). As another example of excessive punishment being ultra vires, a state court has held that school officials have no authority to withhold the diplomas of students who refuse to wear caps and gowns in a graduation ceremony, although they may exclude them from the ceremony. *Valentine v. Ind. Sch. Dist.*, 191 Ia. 1100, 183 N.W. 434 (1921). See also p. 8, *supra*.

Expulsion or an indefinite period of suspension may be regarded as ultra vires for being too harsh to bear any reasonable relationship to the misdeed. *Holman v. School Trustees of Avon*, 77 Mich. 605, 43 N.W. 996 (1899); *Wayland v. Board of School Directors*, 43 Wash. 441, 86 P. 642 (1906) (*dicta*); *Cf*. *Minor Girl v. Clark County Juvenile Court Services*, 490 P.2d 1248 87 Nev. 544 (1971); *Tavano v. Crowell*, Equity No. 32699 (Mass. Super. Ct. Aug. 21, 1973) [the court's memorandum is reproduced in the Center's CLASSIFICATION MATERIALS (Revised Ed., Sept. 1973) at 181. *Cf*. *Fertich v. Michener*, 111 Ind. 472, 11 N.E. 605 (1887) (*Held*, school officials may require tardy pupils to wait in the hall or the principal's office.)

SCHOOL RULES REQUIRING STUDENTS TO MAKE PURCHASES FROM SCHOOL OR PAY FOR DAMAGED SCHOOL PROPERTY

In *Hailey v. Brooks*, 191 S.W. 781 (Tex. Civ. App. 1916), a school's rule forbidding pupils to buy food and supplies from outside sources was found unreasonable. The court ruled that there must be a specific exception to the state antitrust law before the board can do this. But see *Fitzpatrick v. Board of Educ. of Central Sch. District No. 2 of Town of St. Johnsville*, 54 Misc. 2d 1085, 284 N.Y.S.2d 590 (1967) (*Held*, school officials may prohibit pupils from leaving the school grounds during lunch period); *Casey County Bd. of Educ. v. Luster*, 282 S.W.2d 333 (Ky. 1955) (same); *Flory v. Smith*, 145 Va. 164, 134 S.E. 360 (1926) (same).

Of course school officials should punish children for willful property damage, but the element of willfulness should be present, and the punishment appropriate (always following procedural due process, of course). In *State v. Vanderbilt*, 116 Ind. 11, 18 N.E. 266 (1888), a teacher's rule requiring payment for property damage was deemed reasonable in the lower court's instructions to the jury, but unreasonable by the state's high court, *id*. at 267:

> We think that a rule requiring pupils to pay for school property which they may wantonly and carelessly break or destroy, is not a reasonable rule, and therefore that teachers have no right to make and enforce such a rule by chastisement of the pupils.

The court stated that "wantonly and carelessly" amounted to carelessness, which is a common fault of children, that they cannot be punished for unintentional acts, and that " . . . no rule is reasonable which requires of the pupil what they cannot do." Most children, it was stated, cannot afford to pay for damaged property, since their parents generally cannot or will not provide them with that money. See also Holman v. School Trustees of Avon, 77 Mich. 605, 43 N.W. 996 (1889). The court ordered reinstatement of a child who had been suspended because he broke a school window which his father refused to replace. A state law gave the board responsibility to care for the school, to make and enforce regulations and to expel or suspend a student guilty of "gross misdemeanor or persistent disobedience." The court concluded that the board action was unauthorized, especially in view of its paramount duty to educate the child. Finally, the same result appeared in Perkins v. Board of Directors of the Ind. Sch. Dist. of West Des Moines, 56 Ia. 476, 9 N.W. 356 (1880). ("The rule requiring him to make payment is not intended to secure good order, but to enforce an obligation to pay a sum of money.") See also p. 188, infra (Substantive due process considerations).

OTHER ULTRA VIRES ACTS

Other acts deemed to be ultra vires in similar decisions included requiring a child to perform chores, State v. Board of Educ. of Fond du Lac, 63 Wis. 234, 23 N.W. 102 (1885); requiring school patrols, Opinion of the Deputy Attorney General to the Superintendent of Public Instruction Re Student Patrols, 11 Pa. Dist. and County Rep. 660 (1929); and requiring a student to take a course not required by statute (bookkeeping), Rulison v. Post, 79 Ill. 567 (1875). Cf., Morrow v. Wood, 35 Wis. 59, 17 Am. R. 471 (1874), where the appellate court ordered a new trial in an action against a teacher, holding that she exceeded her authority if she punished a child for obeying his father's commands (not to study geography).

In State ex rel. Bowe v. Board of Educ. of Fond du Lac, 63 Wis. 234, 23 N.W. 102 (1885), the school based its decision to punish on a rule requiring work as well as a rule forbidding disobedience of teacher's orders. The court found the first rule and the order to follow it ultra vires, id. at 104:

> . . . rules and regulations made must be reasonable and proper, or [in statutory terms] 'needful,' for the government, good order, and efficiency of the schools -- such as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare. But the rules and regulations must relate to these objects.

The ultra vires doctrine governs the relationship between superior and inferior arms of the school bureaucracy. For example, in Cordova v. Chonko, 315 F.Supp. 953 (N.D. Ohio 1970), the court ruled that a board of education rule which gave an administrative employee the power to make specific rules and regulations on the subject of student cleanliness and dress did not include the power to regulate hair style, because the student retains a hair style for 24 hours a day, whereas dress and cleanliness are mutable and can be changed during school hours.

The Rule Against Delegation

As a corollary to the rule limiting the school board to that which the legislature authorizes it to do, there is also a rule which prohibits the legislature from delegating overly broad powers, and, in effect, abandoning its own legislative functions. See *e.g.*, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Zemel v. Rusk*, 381 U.S. 1 (1965).

This rule is distinguishable from the ultra vires doctrine in that a statute does purport to authorize the action. GELLHORN AND BYSE, ADMINISTRATIVE LAW: CASE AND COMMENTS (6th Ed. 1974) at 58:

> The ultra vires doctrine says the administrative *action* is invalid because it is outside the power conferred. This delegation doctrine says the *statute* purporting to confer the power is invalid because the legislature cannot delegate its powers. . . Here. . .the legislature has expressed a desire to grant authority--and the judiciary has overruled the legislative choice.

For sharp criticism of this rule see DAVIS, ADMINISTRATIVE LAW TREATISE, Sec. 2.01, 2.11 (1958, Supp. 1970). The rule against delegation is often seen as unrealistic in the face of a great need for flexibility by some governmental agencies. Moreover, delegation to an elected body of local government, such as a school board, should be viewed more liberally than delegation to other agencies of the state. *Cf.* 1 McQUILLIN, Sec. 4.08 (1966).

The test of a lawful delegation is the presence of clear standards in the law which specify when and how the administrative agency is to act. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). This set of rules applies to educational institutions as well as other public agencies. See *e.g.*, *Hander v. San Jacinto Jr. Col.*, 325 F.Supp. 1019 (S.D.Tex. 1971), *cert. denied*, 411 U.S. 982 (1973).

This doctrine was relied upon in *Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555, 562 (Iowa 1972). In *Bunger*, schools that were members of the IHSAA, a state-wide athletic group, agreed to forbid their athletes the use of alcoholic beverages. Sanctions were placing the school on probation, or suspending or expelling it from the association and the barring of athletes from interscholastic competition. One part of the rule made the ban mandatory upon conviction for using drugs or alcoholic beverages. The plaintiff was arrested, a case of beer was found in the car, and all the occupants pleaded guilty. The court found that a member school board had unlawfully delegated its policy-making powers to the IHSAA, *id.* at 560, quoting *Kinney v. Howard*, 133 Ia. 94, 104-5, 110 N.W. 282, 286 (1907):

> While it is a general rule that power conferred upon a public board or body cannot be delegated, yet a public corporation . . . may. . . do its ministerial work by agents or committees. . . where the act to be done involves judgment or discretion, it cannot be delegated to an agent or committee.

The court rejected an argument that each school had independently adopted the rule, pointin out that the schools were not entirely free to decide, for those which might vote against the IHSAA rule would have to withdraw (or be expelled) from the association. *Id.* at 561.

In keeping with a general judicial preference for construing laws narrowly so as to preserve them, some courts may simply limit a particular law delegating broad general authority to a school board, rather than declare it unconstitutional as a delegation of the legislative function. This was the approach taken by the court in Alexander v. Thompson, 313 F.Supp. 1389 (C.D. Cal. 1970). A high school student sought relief from a school regulation governing the length of sideburns. The state law gave local school boards general authority over disciplinary matters. The court granted a temporary injunction against the rule and, pursuant to the abstention doctrine, retained jurisdiction pending adjudication of the issues in state court. The temporary relief was granted on the assumption that there was an unlawful delegation. The court noted, id., at 1395, 96:

> [A] general grant of power to a local school board [i.e., power to prescribe rules for discipline in the schools under its jurisdiction] should not be construed to enable it to make decisions of the type that are generally and more appropriately reserved for the legislature. . . .
>
> . . . .
>
> Particularly where discretion is reposed in administrative agencies the legislature must, in delegating rule-making authority, fix a primary standard to guide such discretion so as to limit or confine the exercise of the authority conferred.

Cf. Neuhaus v. Federico, 12 Or. App. 314, 505 P.2d 939 (1973) (voiding hair rule adopted by students).

Perhaps the rule against unlawful delegation will be most useful where a strong teacher's organization has secured a contract which provides for less than a fair procedure in student discipline. The master contract between the Board of Education of the City of Erie and the Erie Education Association for 1972-74, for example, covered discipline in detail, authorizing a teacher to remove a child from the classroom and send him or her to another. The receiving teacher has also "the right to refuse to accept the disruptive student in his classroom." If both teachers want to be rid of the student there is no readmission until a special committee has met and decided what to do. This procedure was invalidated in a consent decree signed by Judge William Knox in Jordan v. School Dist. of the City of Erie, Pennsylvania, Civil No. 34-73 (W.D. Pa. Feb. 5, 1974). But, cf. Lathrop v. Donohue, 367 U.S. 820 (1961) (upholding an integrated state bar).

A plaintiff's brief in Parents Union for Public Schools in Philadelphia v. Board of Educ., Civil No. 2983 (filed Jan. 14, 1975), tangentially discusses similar problems arising there. The primary argument focuses on the proper interpretation of statutes regulating collective bargaining, however. (Clearinghouse No. 14,354 B).

Finally, of course, a school board may not escape constitutional requirements by delegating its functions to others. Cf. Lemke v. Black, 376 F.Supp. 87 (E.D. Wis. 1974). The court permitted the school board to delegate the task of planning graduate ceremonies to students, but it held that the student plans must be subject to the same constitutional infirmities, if any, as would be board plans. Plans to hold the ceremony in a Catholic Church were found likely to be in violation of the religious protections of the first amendment and temporary relief was ordered.

P. M. Lines
Center for Law and Education
August 1, 1975

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III.

Substantive Constitutional Rights of Students

III. Substantive Constitutional Rights of Students

This part of the manual discusses the substantive constitutional rights of students -- rights based upon the first, fourth, fifth, ninth and fourteenth amendments. Part A focuses on first amendment rights, and contains six subdivisions which relate to 1) religion and conscience; 2) free expression; 3) free expression intermixed with activity (entitled From Silent Symbols to Sit-ins to Walk-outs); 4) the rights of organizations; 5) the right to obtain access to information in the possession of others; and 6) the overbreadth doctrine.

Part B presents material on privacy as derived from the fourth amendment and federal statutory safeguards. Other "privacy" theories are discussed under Substantive Due Process.

Part C is a limited discussion of equal protection violations. It includes a discussion of sex and wealth discriminations, and briefly reviews other kinds of discriminations, such as age, marital status, or non-residency.

Part D, Substantive Due Process, is also limited in scope. Part D includes two specific problems arising under the due process clause -- the right of students to have clear and precise rules of conduct established and published prior to discipline (the note on Vagueness) and the right of students to govern their own hair length and grooming. There is also a Part D(3) which discusses substantive due process theories in a number of contexts where the school board has attempted to regulate more than is necessary to maintain school functions. Dormitory living requirements and regulation of off campus activity are discussed here. Another substantive right -- to be free from cruel and unusual punishment -- is discussed in Part V (C), Corporal Punishment -- as it is a right which is particularly pertinent where school officials use corporal punishment.

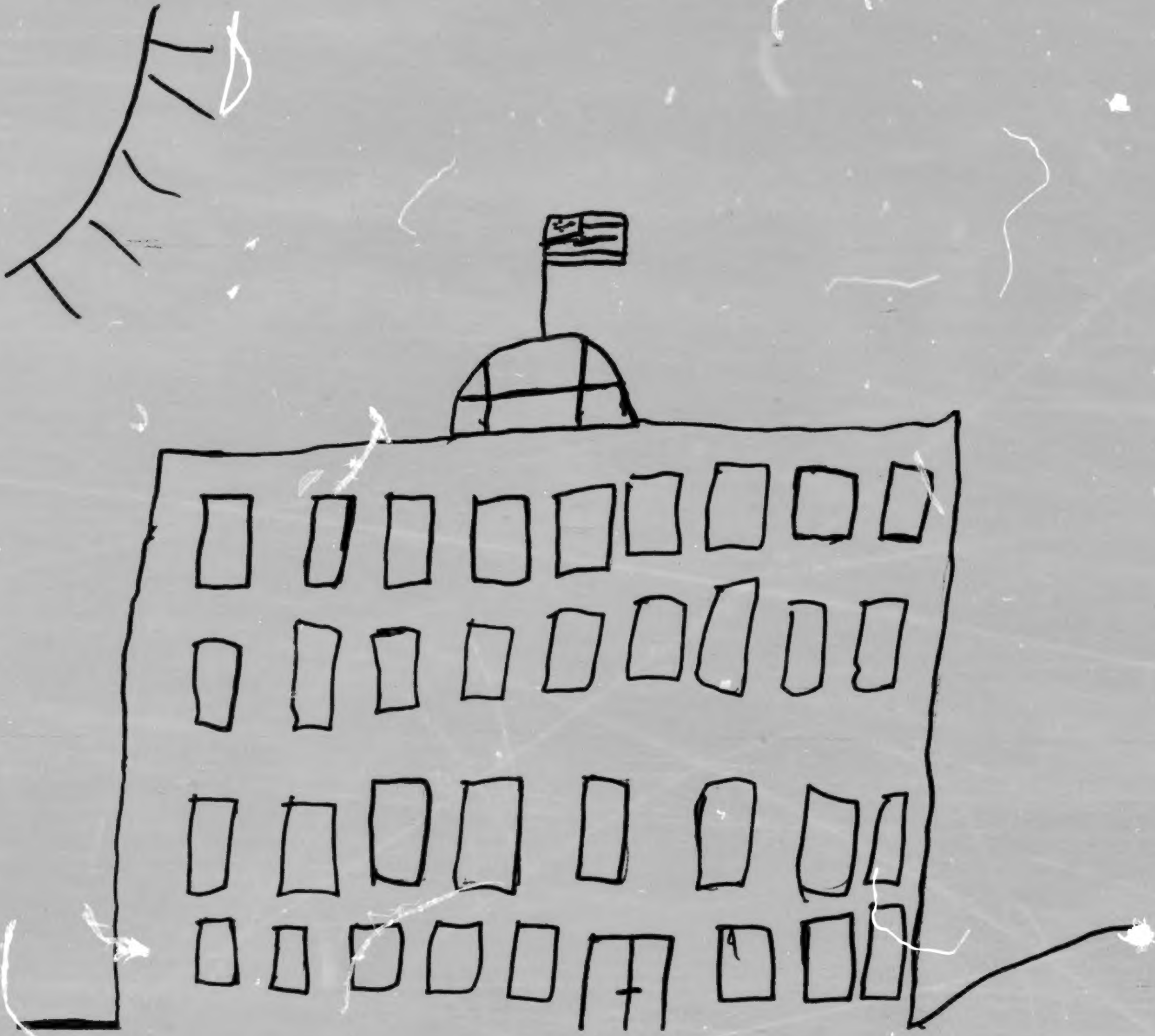

illustration courtesy of Jeremy Pressman

III(A) The First Amendment

The first amendment guarantees all people -- including students -- certain basic freedoms:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Part III(A) of this manual deals with the case law elaborating on the substantive rights of students under these provisions. It does not discuss all school-related problems arising under the first amendment, however. The major topic which is excluded concerns the prohibition against establishment of, and the guarantee of free exercise of religion. These principles are discussed only where they relate to freedom of conscience or symbolic expression generally. (They are excluded as a major topic as we have had virtually no requests from legal services offices for assistance in such cases.)

This note does deal with students' right generally to peacefully follow the dictates of conscience and religion, as well as advocacy of these beliefs; the right to free speech and press, including, for example, the right to publish and distribute both unofficial and school sponsored written materials; the right to be free of censorship of content as well as unreasonable prior restraints; the right to symbolic expression and peaceful demonstration; the freedom of assembly, including the right to affiliate with other students without special restrictions on groups holding unpopular views, but not others; and the right to have access to outside speakers and other sources of information.

III(A)(1) Freedom of Religion and Conscience

Explicit in the clause guaranteeing the free exercise of religion and implicit in the entire first amendment is a requirement that all people be permitted to believe what they will. This right extends some protection to students and others who are compelled to do or say things which offend their consciences. Thus, flag salutes, school prayers, unreasonable compulsion to study certain subjects and similar duties of students in school may offend the first amendment. In some ways the rights involved add up to a right to be left alone--to remain silent and to abstain from an otherwise required part of schooling--where one's conscience requires it.

In order to resolve problems in this area, the court is faced with the problem of adjusting the tension between the school as a socializing institution and the autonomy of the individual student. Both the establishment and free exercise clauses of the first amendment as well as the free speech rights found in the first amendment are helpful in this process.

The establishment clause does not simply bar a congressional enactment *establishing a church*; it forbids all laws respecting an *establishment of religion*, *McGowan v. Maryland*, 366 U.S. 420, 441-442 (1961). Stated another way "to withstand the strictures of the Establishment Clause . . . [a law] must [have] a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963). What is most significant about the establishment clause is that it "does not require any showing of direct governmental compulsion," *Engel v. Vitale*, 370 U.S. 421, 430 (1962) and therefore a plaintiff need not allege that the challenged law infringes upon his or her religious beliefs but only that it "aid[s] one religion, all religions or prefer[s] one religion over another." *School Dist. of Abington Township v. Schempp*, 374 U.S. at 216 (1962). Moreover, the prohibitions embodied in the establishment clause have been made wholly applicable to the states by the fourteenth amendment, *id*. at 1506 and the cases cited therein.

The free exercise clause is aimed at preventing governmental infringement upon the most basic aspects of individual autonomy. The Supreme Court has held that the free exercise clause forbids regulation of religious beliefs. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). The state may neither compel affirmation of a repugnant belief nor penalize or discriminate against individuals or groups because they hold religious beliefs abhorrent to state authorities, *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

In addition to *beliefs*, the free exercise clause guarantees against interference with the *practice* of one's religion. But because practice involves acts, not merely beliefs, this guarantee must give way if the act involves "some substantial threat to public safety, peace, or order." *Id.* at 403, citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor laws prohibiting child from distributing religious literature); *Cleveland v. United States*, 329 U.S. 14 (1946) (polygamy).

SCHOOL PRAYER

In *Engel v. Vitale*, 370 U.S. 421, 424 (1962), a challenge to the daily reading of a prayer composed and promulgated by the New York Board of Regents, the Supreme Court ruled that such a practice was "wholly inconsistent with the Establishment Clause." The prayer consisted of only twenty-three words which acknowledged dependence upon God and asked for "Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422. Although the Court acknowledged that the prayer was brief and general, it did not agree that "there can be no danger to religious freedom in its governmental establishment," citing James Madison's warning "to take alarm at the first experiment on our liberties." *Id.* at 436.

One year later in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), the Court made its prohibition against prayer in the schools absolute by striking down "state action requiring that schools begin each day with readings from the Bible." *Id*. at 205. However, in *dicta*, the court did concede that "study of the Bible or of religion, when presented objectively as part of a secular program of education" is permitted. *Id*. at 225.

Since 1963, the lower courts have consistently struck down all forms of school prayer as a violation of the establishment clause, *e.g.*, *Alabama Civil Liberties Union v. Wallace*, 331 F.Supp. 966 (D.Ala. 1971), *aff'd*, 456 F.2d 1069 (5th Cir. 1972) (striking down state statute requiring daily Bible readings in the public schools); *Adams v. Engelking*, 232 F.Supp. 666 (D.Ida. 1964) (same); *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir. 1965) (striking down a prayer program initiated by students). The school prayer cases extend in principle to other kinds of compulsions, as will be discussed in the section on curriculum, *infra* at 29-31.

FLAG SALUTE

Closely related to the school prayer issue is the question of whether or not school officials may condition school attendance upon saluting the American flag when compliance would violate a student's beliefs. In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Supreme Court held that such a practice "transcends constitutional limitations and . . . invades the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control." *Id*. at 642. The Court stressed that a compulsory flag salute, "compels a belief and an attitude of mind," *id*. at 633, a practice that is outlawed by the first amendment even if such compulsion does not interfere with the free exercise of religion, unless it can be justified by a "clear and present danger". Id. at 634. To do otherwise would be to sanction compelling a person "to utter what is not in his mind." Id.

Although the plaintiffs in Barnette objected to the flag salute as an infringement on their religious beliefs (they were Jehovah's Witnesses) the Supreme Court based its ruling on free speech as well as free exercise considerations. Consequently, subsequent litigation has broadened the Court's ruling to include non-religious objection as well as to expand permissible modes of "non-participation." In Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973) the court upheld the constitutional right of a high school senior to remain quietly seated during the flag salute and in doing so struck down a school board regulation that required non-participants to leave the room. Id. at 638. Previously, the same court had upheld the right of a probationary teacher to stand silently during the flag salute. Russo v. Central School District No. 1, 469 F.2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973). Additional authority supporting the right to remain silent during the flag salute may be found in Hanover v. Northrup, 325 F.Supp. 170 (D. Conn. 1970); Banks v. Board of Public Instruction of Dade County, 314 F.Supp. 285 (S.D.Fla. 1970)(three-judge court), aff'd per curiam, 450 F.2d 1103 (5th Cir. 1971) vacated, 401 U.S. 988 (1971); Frain v. Baron, 307 F.Supp. 27 (E.D.N.Y. 1969); State v. Lundquist, 262 Md. 534, 278 A.2d 263 (Ct.App.Md. 1971). At least one court has held that public school students have the right to remain seated during the playing of the national anthem. Sheldon v. Fannin, 221 F.Supp. 766 (D.Ariz. 1963).

COMPULSORY EDUCATION

"There is no doubt as to the power of a State . . . to impose reasonable regulations for the control and duration of basic education," Wisconsin v. Yoder, 406 U.S. 205 (1972), but a problem arises when this power interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), an action challenging an Oregon law that made attendance at public schools compulsory, the Supreme Court held that such a statute infringed on the plaintiffs' liberty "by forcing them to accept instruction from public teachers only," and that parents had a right to provide an equivalent education in a privately operated system. Although the sources of the parents' right is unclear the Court did establish that the state's interest in universal education is not totally free from a balancing process when it impinges on fundamental rights and interests. Pierce v. Society of Sisters, 268 U.S. at 535.

Forty-seven years later in Wisconsin v. Yoder, 406 U.S. 205 (1972), an action brought by Amish parents challenging Wisconsin's universal education laws which compel children between the ages of 7 and 16 to attend school, the Supreme Court was called upon to determine to what extent a compulsory education law must yield to the free exercise clause of the first amendment "and the traditional interest of parents with respect to the religious upbringing of their children so long as they . . . prepare [them] for additional obligations." Id. at 214. The plaintiffs claimed that the particular nature of the Old Amish religion which is "characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence," id. at 210, makes public education beyond the eighth grade an infringement upon their religion because of its emphasis on competition, its pressure to conform to the styles and manners of the peer group, and the fact that it takes children away from their community, physically and emotionally, during the crucial and formative adolescent period of life. Id. at 211. Testimony at trial established that public education for Amish children beyond the eighth grade might result in the destruction of the Old Amish Church community and that the Amish provide a viable alternative to high school through a system of "learning by doing" in the Amish community "which is perhaps superior to ordinary high school education." Id. at 212. The free exercise claim of the Amish parents which in the Court's words was "aided by three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, id. at 235, combined with the state's diminished interest in providing public education for Amish children between the ages of 14 and 16 in light of the alternative vocational training provided by the Amish community, id. at 209, persuaded the Court to make a narrow exception to the Wisconsin universal education laws. It should be noted that the rights of Amish children to attend high school against the wishes of their parents was not addressed by the majority opinion although a concurrence and a dissent clearly stated that the rights of the high school aged children to an education should prevail over their parents' free exercise claim. Id. at 241, 243.

The limited reach of the Court's holding in Yoder is illustrated in the recent case of Scoma v. Chicago Bd. of Educ., 391 F.Supp. 452 (N.D.Ill. 1974), an action seeking to enjoin Chicago school officials from interfering with parents' decision to educate their school-age children at home by enforcement of the state compulsory attendance statute. Relying heavily on Yoder, the Court held that the plaintiffs' asserted right to educate their children "as they see fit and in accordance with their determination of what best serves the family's interest and welfare does not arise above a personal or philosophical choice" which is not constitutionally protected. Id. at 461. In fact, the Court held, again relying on Yoder, that "[a]side from claims based on the free exercise of religion clause, compulsory attendance statutes have generally been regarded as valid," subject to the limited right of parents to seek a reasonable alternative to public education in accredited private schools. Id. at 460-461. The ruling in Scoma appears to be an accurate statement of the law with respect to compulsory school attendance under statutes similar to that in effect in Illinois.

Aside from Yoder, very few courts have been willing to engraft any kind of exception onto the state's compulsory education laws. In In re Skipwith, 180 N.Y.S.2d 852 (1958), the domestic relations court of New York City permitted a white child to stay at home because of the parent's philosophical objections to the quality of schooling available at a predominantly black school. The case was not appealed. In Dobbins v. Commonwealth, 198 Va. 697, 96 S.E.2d 154 (1957) the Court held that a compulsory attendance law could not be used to require a black child to attend a far away segregated black school when there was a nearby white school which he wanted to attend. Both of the holdings depend upon a fact situation which raised both equal protection and freedom of conscience issues, and cannot be relied upon as authority for a general attack on compulsory attendance laws.

CURRICULUM

The interrelationship between the free exercise and establishment clauses is well illustrated in the cases that challenge either explicit or implicit attempts to "aid one religion, aid all religions, or favor one religion over another" in the formulation of public school curriculum, Everson v. Board of Educ., 330 U.S. 1 (1947). The "curriculum" cases involve prohibitions against the teaching of certain subjects for religious reasons, requirements involving curriculum offensive to some religious beliefs, and policies that integrate religious activities with the school curriculum.

In Epperson v. Arkansas, 393 U.S. 97 (1968), a challenge to an Arkansas statute forbidding the teaching of evolution in the public schools as well as in publicly supported colleges and universities of the state of Arkansas, the Supreme Court enunciated the principles to be applied to determine whether curriculum prohibitions violate the first amendment. The Court held that the first amendment "does not permit the state to require that teaching and learning be tailored to the principles or prohibitions of any religious sect or dogma." Id. at 106. In other words, "the state has no legitimate interest in protecting any or all religions from views distasteful to them." Id. at 107. The Court viewed the free exercise clause as enforceable only so long as this did not violate the establishment clause. To protect a religion "from views distasteful to [it]" may put the state in the position of favoring one religion over another. The Court stated that Arkansas might "legally excise from the curricula of the school all discussions of the origin of man," but it could not "blot out one theory because of its supposed conflict with the Biblical account literally read." Id. at 273.

Variants on the Epperson evolution case are reported regularly. For instance, in Wright v. Houston Ind. Sch. Dist., 366 F.Supp. 1208 (S.D.Tex. 1972), aff'd, 486 F.2d 137 (5th Cir. 1973), a challenge by public school students to the teaching of evolution without also presenting the Biblical theory of the creation was rejected on the ground that the intrusion upon religious neutrality was too nebulous to constitute a violation of constitutional rights. Id. at 1210. More recently in Daniels v. Waters, Appeal No. 74-2230 (6th Cir. April 16, 1975) a Tennessee statute that required the teaching of the Biblical version of the creation whenever the theory of evolution was discussed but not the converse, and excluded the teaching of "Satanical beliefs" was struck down for giving preferential treatment to the Bible. Generally speaking the courts look with disfavor upon attempts to inhibit the teaching of evolution by requiring other religious views to be presented because it involves "an excessive government entanglement with religion," Id.

It is also clear that Epperson does not give teachers a right to structure courses as they see fit as a general matter. See Adams v. Campbell County Sch. Dist., 511 F.2d 1242 (10th Cir. 1975) (Vietnam discussions); Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969) (same); Mercer v. Michigan State Bd. of Educ., 379 F.Supp. 580 (E.D. Mich. 1974), aff'd, 95 S.Ct. 673 (1974) (teacher sought to include instruction on birth control in curriculum).

Some cases have involved courses which were offensive to a student's religious beliefs. The courts are usually unsympathetic: "the state has no legitimate interest in protecting any or all religions from views distasteful to them." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). This point is illustrated in the cases where students alleged that Darwin's theories offended their beliefs. E.g., Wright v. Houston Ind. Sch. Dist., supra. In Davis v. Page, 385 F.Supp. 395 (D.N.H. 1974) members of the Apostolic Lutheran faith objected on religious grounds to their children's exposure both to audio-visual materials and a sex education course. The court held that since parents have no constitutional right to deny their children an education, the interests of the parents in the free exercise of religion must give way to the state's interest in providing universal education, id. at 400-401, except in cases in which audio-visual materials are being used for entertainment only. Id. at 401. With respect to the sex education classes, the court held that the parents merely found the course to be distasteful, and therefore they cannot invoke first amendment protections. Id. at 404. A similar position was taken in Williams v. Board of Educ. of City of Kanawha, 388 F.Supp. 93 (S.D.W.Va. 1975), an action challenging a school system's adoption of textbooks as undermining plaintiffs' religious beliefs. The Court rejected the claim, citing Epperson v. Arkansas, 393 U.S. 97 (1968), to support the proposition that the first amendment does not guarantee that nothing offensive to any religion will be taught in the schools.

In exceptional cases, the courts will allow students to choose not to participate in school activities offensive to their religious beliefs. In Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972), an action challenging a requirement that plaintiff participate in an R.O.T.C. program, the court held that the state's interest in compelling a high school student to participate in a program of military training was not so great as to justify an infringement on plaintiff's exercise of his religious beliefs, id. at 799, especially when alternative physical education facilities were available. However, in Sapp v. Renfroe, 372 F.Supp. 1193 (N.D.Ga. 1974), the court refused to adopt the reasoning of Spence at least for "non-religious" objections to participation in R.O.T.C. By the time the case reached the Fifth Circuit Court of Appeals the plaintiff had graduated from high school and thus the part of the case which challenged the mandatory participation in R.O.T.C. was declared moot. 511 F.2d 178 (5th Cir. 1975) (adjudicated on the question of damages). The ruling in Sapp is clearly open to challenge in light of the Supreme Court ruling in Welsh v. United States, 398 U.S. 333 (1970), which validated "non-religious" objections to war which are deeply and sincerely held as sufficient to warrant conscientious objector status. Although the Welsh decision is based upon the Court's interpretation of the Universal Military Training and Service Act, the language of the opinion is arguably broad enough to cover compulsory R.O.T.C. The "entertainment exception" to compulsory curriculum mentioned above in Davis v. Page, 385 F.Supp. 395, 401 (D.N.H. 1974) is also worthy of note here.

The last group of "curriculum" cases involve allegations that "release time" programs in public schools that allow students to receive religious instruction during school hours run afoul of the establishment clause. Over twenty years ago in Zorach v. Clauson, 343 U.S. 306 (1952), the Supreme Court sanctioned a New York program that allowed students to be released for one hour a week at the end of the class day so that they might attend religious classes in centers established for the purpose. Id. at 681. Students were released on written request of their parents; the churches made weekly reports to the school of those on their "lists" who did not report for instruction, and those not released stayed in the classrooms. *Id*. In holding that the program did not run afoul of the establishment clause in the court likened the program to excusing a student for observance of a religious holiday, *id*. at 684, and distinguished *McCollum v. Board of Educ.*, 333 U.S. 201 (1948), which involved a similar release time program on the ground that in that program religious instruction was given in the public school classroom as opposed to an off-campus religious center.

Recently, two courts have reached opposite results with respect to cases factually similar to *McCollum*. In *State ex rel. Hott v. Thompson*, 66 Wis.2d 659, 225 N.W.2d 678 (1975), the Wisconsin Supreme Court upheld a statutory program which provides for the release of public school students during the school day to attend religious centers for religious instruction on the strength of *McCollum*, stating that there was no establishment of religion where neither religious instruction in public school classrooms nor the expenditure of public funds are involved. However, in *Smith v. Smith*, 391 F.Supp. 443 (W.D.Va. 1975) the court held unconstitutional a Virginia town's "release time" program and expressed doubt about the continued vitality of *McCollum* in light of subsequent Supreme Court decisions such as *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (striking down provisions for school prayer), and *Engel v. Vitale*, 370 U.S. 421 (1962) (same); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a statute prohibiting the teaching of evolution); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (striking down state programs providing supplements to teachers' salaries, textbooks and instructional materials in religious schools). In addition, the court distinguished *Smith* from *McCollum* on the facts because in *Smith* the classes were held in a mobile trailer next to school grounds and school officials aided in the administration of the program. *Smith*, 391 F.Supp. at 449. Finally the *Smith* court's reliance on the language in *Walz v. Tax Commission*, 397 U.S. 664 (1970) a case involving state property tax exemptions for religious organizations, which prohibits "an excessive government entanglement with religion" seems persuasive. Release time programs of any sort will probably have difficulty passing constitutional muster. See *Smith*, 391 F.Supp. at 447-448.

MANDATORY SUPPORT OF SCHOOL PAPER

Sometimes a student who disagrees vehemently with the campus newspaper which he is forced to support through payment of mandatory fees will object on first amendment grounds. In two cases of this type, the courts have rejected the claim. *Veed v. Schwartzkopf*, 353 F.Supp. 149 (D.Neb. 1973) *aff'd without opinion*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); *Levison v. Board of Regents of Univ. of Nebraska*, 189 Neb. 688, 204 N.W.2d 568 (1973). The court in *Veed* acknowledged that the first amendment "protects the students from official compulsion to adopt or verbalize any particular political or personal philosophy. . . ," 353 F.Supp. at 153, but at the same time ruled that the university could properly present a broad range of ideas through various means, as long as it does not assume "the role of advocate for the particular philosophy expressed by the speakers and the newspaper." *Id*. at 152.

In Arrington v. Taylor, 380 F.Supp. 1348 (M.D.N.C. 1974), a similar mandatory fee schedule at the University of North Carolina was challenged on the ground that part of the fees were used to support The Daily Tar Heel, the student-run newspaper, which, it was alleged, "takes positions and advocated ideas contrary to those held by plaintiffs," id. at 1360, violating their first amendment rights. The Court rejected plaintiffs' claim, citing Veed that the Tar Heel although it does express editorial points of view makes space available to opposing points of view, that its editor is democratically elected, and that "[t]here is simply no factual basis for concluding that the University's motives in maintaining financial support for The Daily Tar Heel are other than laudable." Id. at 1363. Thus, it is safe to say that absent some showing that a state college or university is using mandatory student fees to advocate or support a particular point of view to the exclusion of opposing views, challenges to mandatory fee collection on first amendment grounds will probably fail.

See also the discussion censorship of school papers at p. 68, infra.

SURVEILLANCE

The right to be left alone--to remain silent and to be permitted one's own opinions and views and beliefs--also extends to a right to be free of surveillance. The presence of spies--whether sent from the school principal's office, the police department or some other agency of the state--can have a profoundly chilling effect on the expression of opinions and beliefs. One need only examine the status of free expression in countries where citizens are spied on regularly to affirm this observation. In White v. Davis, 13 Cal.3rd 757, 120 Cal. Rptr. 94, 533 P.2d 222 (1975), the court refused to dismiss a suit, on the demurrer of the defendants, filed against the police department seeking an injunction against a covert intelligence operation at the University of California in Los Angeles. The court accepted as true the allegations that the covert activity was taking place and that the police were compiling dossiers on "matters which pertain to no illegal activity or acts . . . ." 13 Cal.3rd at 765, 533 P.2d at 234. The Court held that the protection of the Constitution extended to protect citizens from indirect interference with their fundamental rights, and observed that:

> The threat to First Amendment freedoms posed by any covert intelligence gathering network is considerably exacerbated when . . . [the] focus [is] upon university classrooms and their environs. Id. at 768.

The court also held that the presence of police undercover agents would have a potentially inhibiting effect on free expression,

> In view of [the] significant potential chilling effect, the challenged surveillance activities can only be sustained if defendant can demonstrate a 'compelling' state interest which justifies the resultant deterrance of First Amendment rights and which cannot be served by alternative means less intrusive on fundamental rights.

Id. at 768.

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Center for Law and Education
July 30, 1975

III(A)(2) Freedom of Expression

THE TINKER STANDARD

Any discussion of student expression must begin with the leading Supreme Court decision of Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503 (1969). While Tinker involved symbolic action -- the wearing of black armbands -- courts have applied its standards to a wide assortment of other first amendment situations.

In Tinker, the Supreme Court upheld the right of students to wear, within school, black armbands expressing opposition to the Vietnam war. At the outset, the court considered the applicability of the first amendment in the school environment, 393 U.S. at 506:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Three additional principles set forth in Tinker are pertinent here. First, the court stated that free expression must prevail in the absence of appropriate specific evidence, and defined the necessary showing, id. at 511, 513:

> In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. . . .
>
> . . . .
>
> . . . But, conduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others, is, of course, not immunized by the constitutional guarantee of freedom of speech.

In applying the standard in Tinker, the court summarized the pertinent facts as follows, id. at 508:

> Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

Further, it characterized the activity as "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners." *Id*. The court concluded, *id*. at 514, (emphasis added):

> . . . the record does not demonstrate *any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities*, and no disturbances or disorders on the school premises in fact occurred.

In short, *Tinker* rejected a *per se* approach to free expression in the school context. Activity is neither immunized because it might be elsewhere, nor unprotected because it occurs in school. Instead there must be in each case an inquiry as to the impact of the activity on the school program and the rights of others.

Second, *Tinker* emphasized the breadth of the right to free expression in the school environment, absent the requisite showing, *id*. at 512-13:

> The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam . . . .

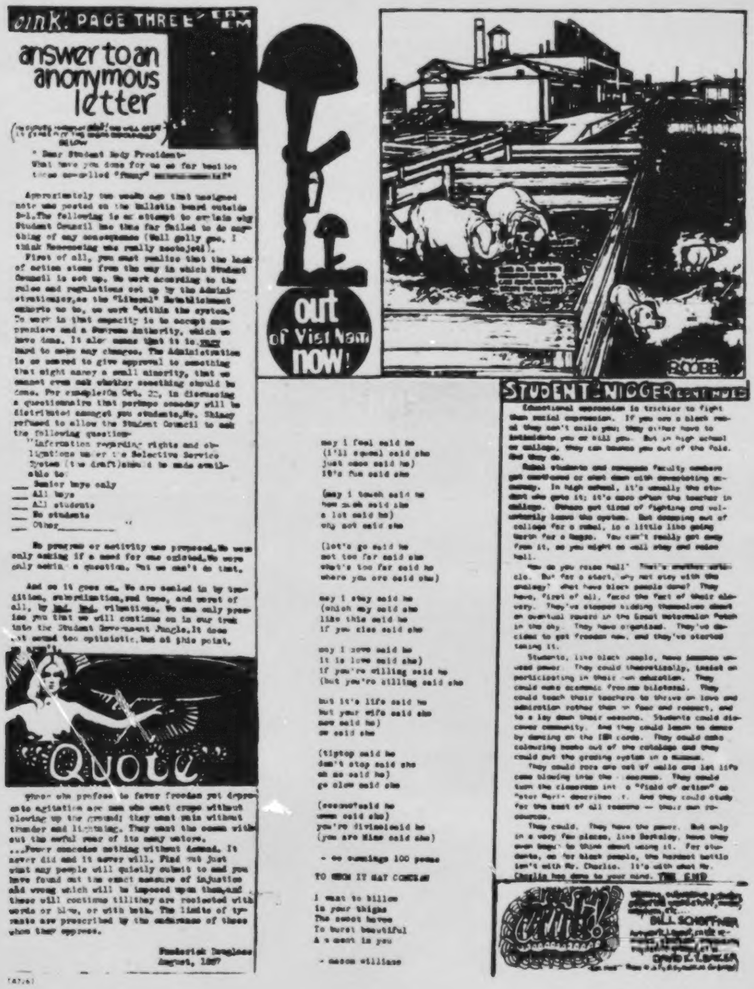
As a corollary, sham opportunities for speech are inadequate. "Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." *Id*. at 513. Officials do not satisfy their constitutional obligations by providing a "safe haven for crackpots" or confining speech "to a telephone booth. . . ." *Id*. at 513.

Third, the court stressed that only concrete concerns will support the limiting of expression. What "may" happen or "might result" is immaterial. *Id*. at 508, 510. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id*. at 508.

In subsequent cases, the court has adhered to the *Tinker* standard. *Grayned v. Rockford*, 408 U.S. 104 (1972) involved the application of an anti-noise ordinance to a demonstration adjacent to a school. The opinion explains *Tinker's* standard as follows, *id*. at 118 (emphasis added):

> Expressive activity could certainly be restricted, *but only* if the forbidden conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

In Papish v. Board of Curators, 410 U.S. 667 (1973), the Court ordered the reinstatement of a student who had distributed an underground newspaper. While the case focused on the paper's content, the Court noted that there had been no claim of disruption and referred to the Tinker standard. Id. at 671-672 n. 6. See also Healy v. James, 408 U.S. 169, 180 (1972)(college's refusal to recognize organization).



oink! PAGE THREE

answer to an anonymous letter

out of Viet Nam now!

STUDENT NIGGER

Quote

STUDENT-CONTROLLED LITERATURE

Unofficial publications -- generally underground newspapers, but including everything except school-sponsored publications -- whether written by students or others are protected under the *Tinker* standard. *E.g.*, *Quarterman v. Byrd*, 453 F.2d 54, 58-59 (4th Cir. 1972); *Riseman v. School Comm. of Quincy*, 439 F.2d 148, 149 (1st Cir. 1971); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 804 (2d Cir. 1971); *Scoville v. Board of Educ.*, 425 F.2d 10, 13 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970). Distribution has also been viewed as protected under the *Tinker* standard in *Papish v. Board of Curators*, 410 U.S. 667 at 671-672 (1973); *Shanley v. Northeast Ind. Sch. Dist.*, 462 F.2d at 970-975 (5th Cir. 1972); *Fujishima v. Board of Educ.*, 460 F.2d 1355, 3159 (7th Cir. 1972); *Scoville*, 425 F.2d at 13-14; *Sullivan v. Houston Ind. Sch. Dist.*, 307 F.Supp. 1328, 1341, 1355-1356 (S.D. Tex. 1969); hereinafter cited as *Sullivan I*, to distinguish it from 333 F.Supp. 1149 (S.D. Tex. 1971), *rev'd*, 475 F.2d 1071 (5th Cir. 1973)(expressly without affecting *Sullivan I*); *Channing Club v. Board of Regents*, 688, 691 (N.D. Tex. 1970); *In re Brociner*, 11 N.Y.Ed. Rept. 204, 207 (N.Y. Comm'r of Ed. 1972).

Moreover, distribution rules have been held facially defective, at least in part because of inconsistency with *Tinker's* disruption standard. *Riseman*, 439 F.2d at 149; *Quarterman*, 453 F.2d at 58-59; *Vail v. Board of Educ.*,354 F.Supp. 592, 597-99 (D.N.H. 1973), *informally approved but remanded for additional relief on other grounds*, 502 F.Supp. 1159 (1st Cir., 1973); *Jacobs v. Board of Sch. Comm.*, 349 F.Supp. 605, 611-612 (S.D. Ind. 1972), *aff'd*, 490 F.2d 601 (7th Cir. 1973),*vacated as moot*, 420 U.S. 128 (1975); *Rowe v. Campbell Union High Sch. Dist.*, Civil No. 51060 (N.D. Cal. Nov. 10, 1970); *O'Reilly v. San Francisco Unified Sch. Dist.*, Civil No. 51427 (N.D. Cal. Nov. 10, 1970). See also *Jones v. Board of Regents*, 436 F.2d 618, 620-21 (9th Cir. 1970) (invalidating a regulation based on similar pre-*Tinker* standards); *Joy v. Yankowski*, Civil No. 71-C-489 (E.D.N.Y. July 12, 1971)(Clearinghouse No. 6181)(consent order providing in part):

> That defendants will not interfere with or keep records of students who distribute literature in school property as long as such distribution does not materially and substantially interfere with normal school activities.

See also *De Anza High Sch. Students v. Richmond Unified Sch. Dist.*, Civil No. C-70-1074 (N.D. Cal., June 4, 1970) (Clearinghouse No. 17,254) (order granting preliminary injunction) (same); *Mt. Eden High School Students v. Hayward Unified Sch. District*, Civil No. C-70-1173 (N.D. Cal., June 4, 1970) (temporary restraining order) (same). In *Sullivan I* the court found the rule upon which discipline was based unconstitutionally overbroad. 307 F.Supp. at 1343-46. In *Eisner*, the court construed a regulation to be consistent with *Tinker* standards. 440 F.2d at 808.

Several points recur in applications of the disruption standard. Which party has the burden of justification where an attempt to limit student expression is challenged? What is the nature of that burden and how may it be met? May distribution be halted or a student punished because of the way others react?

MEETING THE BURDEN OF JUSTIFICATION

Tinker implicitly placed the burden of justifying a limitation of expression on the school system. 393 U.S. at 509 (emphasis added):

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Subsequent decisions in the courts of appeal have explicitly placed this burden on school officials. Scoville, 425 F.2d 10 at 13; Eisner, 440 F.2d 803 at 810; Shanley, 462 F.2d 960 at 969 & n.7.

In addition, Tinker made it clear that general statements alluding to expected disruption would not be sufficient to meet the burden of justification -- "undifferentiated fear" would not be enough. There must be "a specific showing of constitutionally valid reasons to regulate . . . speech. . . ." Tinker, 393 U.S. at 511. The lower courts have remained faithful to this precedent. Thus, in Eisner, the court cautioned that it would not "rest content with officials' bare allegations. . . ." 440 F.2d at 810. The court in Quarterman required "substantial facts which reasonably support a forecast of likely disruption. . . ." 453 F.2d at 59. The fifth circuit in Shanley sought "demonstrable factors" and reminded school officials that "expression cannot be stifled on the sole ground of intuition. . . ." 462 F.2d at 974. It also held that the rule limiting expression must be "substantiated by some objective evidence to support a 'forecast' of disruption." Id. Speculation that students "might" use a fire drill or instigate one to be disruptive was found lacking as justification in Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972). The school officials in one case believed disputes "might" arise; this did not meet the burden of justification. Jones v. Board of Regents, 436 F.2d 618, 621 (9th Cir. 1970). In Vail the court refused to accept school officials' arguments about what "could" or "might" happen. 354 F.Supp. at 599. In Channing Club v. Bd. of Regents, 317 F.Supp. 688, 691 (N.D. Tex. 1970) the fact that "administrative officials anticipated the possibility of some disturbances . . ." was inadequate.

In some of these cases, school officials also attempted to show the required specific instances of potential disruption. In Scoville, for example, officials felt that the student publishers were urging disobedience to school rules, and that this should be enough. An editorial criticized an orientation pamphlet distributed to parents. It "urge[d] all students in the future to either refuse to accept or destroy upon acceptance all propaganda that Central's administration publishes." It termed one article "quite ridiculous" and referred to the procedure for excusing absences as "utterly idiotic and asinine. . . ." The students viewed a statement by the senior dean as "the product of a sick mind." 425 F.2d at 15-16. The district court dismissed the student's complaint, reasoning that the article "amounted to an immediate advocacy of, and incitement to, disregard of school administrative procedures." 286 F.Supp. 988, 992 (N.D. Ill. 1968). The court of appeals reversed. It noted the lower court's finding that no disruption had followed distribution and the failure to take evidence on the impact of the literature on those who bought it. 425 F.2d at 12, 14. It found "criticism of . . . disciplinary policies" and the "disrespectful and tasteless attitude [exhibited] toward [the dean]" insufficient to support a reasonable forecast of disruption. 425 F.2d at 14.

In Shanley the court considered a contention that the controversial nature of materials supported a reasonable forecast of disruption. Articles advocated a review of marijuana laws and offered information on birth control. The court rejected the claim, reasoning that "'controversy' is . . . never sufficient in and of itself to stifle the views of any citizen. . . ." 462 F.2d at 971. The court added that a presidential commission had recently made a similar recommendation on marijuana, that many library materials dealt with birth control and the subjects were widely discussed. Id. at 972. The reference to library materials on birth control introduces a point of some significance. Officials should not be able to establish disruption or another basis for limiting speech when all that is shown is conduct by students which is fully consistent with other practices in the system.

Rowe emphasized that restrictions must be closely related to asserted policy justifications. "[t]he mere invocation of 'immaturity' does not serve to validate general restrictions on students' rights." (Mem. Op. at 7). The court also referred to the need for achieving objectives by "narrower, more particular regulation." For example, if littering is a problem, rather than prohibiting all distribution, "[l]ittering can be prohibited and punished. . . ." Mem. Op. at 9, citing Schneider v. New Jersey, 308 U.S. 147, 162 (1939).

In Sullivan v. Houston Ind. Sch. Dist., 307 F.Supp. 1328 (S.D. Tex. 1969) (Sullivan I), the court held that distribution of an underground paper had not "materially and substantially interfere[d]" with the school program. The court viewed interruptions of class periods as "minor and relatively few in number." It stressed that in the pertinent period only one "discipline card" in any way related to the paper was filed. Id. at 1341. Three teachers had found it necessary to confiscate copies during classes and a fourth before class. In two math classes, there were requests to discuss the paper. Copies were found in a boys' restroom and inside sewing machines in a homemaking class. The papers had been distributed off campus and distributors had requested that they not be taken into school. Id. at 1333-1334.

Some guidance on the proper application of the disruption-disorder standard may be gleaned from Burnside v. Byers, 363 F.2d 744 (5th Cir. 1966), and Blackwell v. Issaquena County Bd., 363 F.2d 749 (5th Cir. 1966), (decisions on "freedom buttons" by a single fifth circuit panel in 1966.) Tinker's standard was drawn from these cases. See 393 U.S. at 513. In Burnside, students wore buttons on voting rights in their high school after being forbidden to do so by the principal.

> The record indicate[d] only . . . mild curiosity on the part of the other school children over the presence of some 30 or 40 children wearing such insignia.

The court held the regulation "arbitrary and unreasonable . . . ." 363 F.2d at 748. In Blackwell a regulation against the wearing of similar buttons was upheld. The court found,

> . . . an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline and decorum.

363 F.2d at 754. In this case, some students had talked noisily in the hall during scheduled class periods; pinned buttons on unwilling students; when sent home, invited others to join them; and at an assembly, "conducted themselves discourteously and displayed an attitude of hostility." Id. at 751. See also Karp v. Becken, 477 F.2d 171 (9th Cir. 1973), where a school officials confiscated signs from a student. The court found that this action was based upon a reasonable forecast of disruption. Id. at 174-176.

THE REACTION OF OTHERS

Non-school Supreme Court cases have long held that the hostile reaction to listeners to free speech is no justification for curtailing the speech. As the court observed in Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949):

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of [ideas . . . .]

It is not enough to prove the speech "stirred people to anger, invited public dispute, or brought about a condition of unrest." Id. at 5.

Tinker does not explicitly address the question of whether orderly and otherwise proper expressive activity may be ended or punished if others react disruptively, although its factual summaries do allude to the conduct of other students. See 393 U.S. at 508, 514. Several cases consider this point.

Orders entered in Sullivan v. Houston Ind. Sch. Dist., 333 F.Supp. 1149, 1153 (S.D. Tex 1971). (Sullivan I) and Jacobs v. Board of Sch. Comm'rs, 349 F.Supp. 605, 611 (S.D. Ind. 1972) state that a "rule must not subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material. . . ." In Shanley v. Northeast Ind. Sch. Dist., the fifth circuit addressed this issue, 462 F.2d 960, 974:

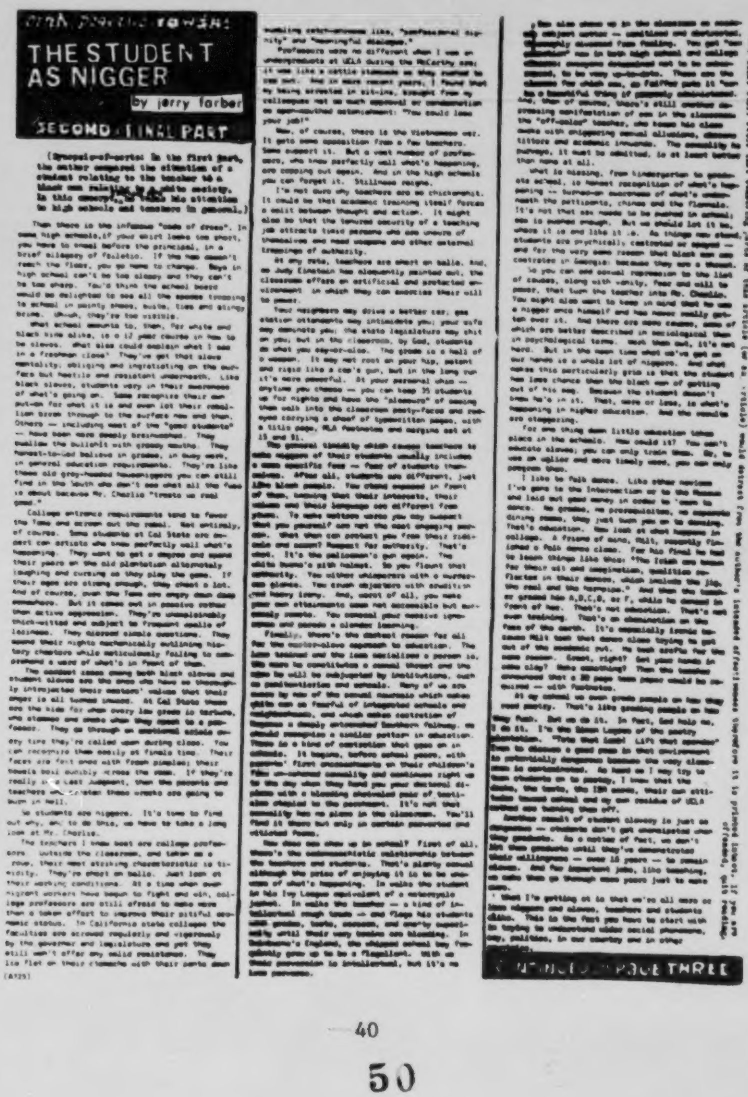
> We are simply taking note here of the fact that disturbances can be wholly without reasonable or rational basis, and that those students who would reasonably exercise their freedom of expression should not be restrained or punishable at the threshold of their attempts at expression merely because a small, perhaps vocal or violent, group of students with differing views might or does create a disturbance.

There is support for requiring reasonable efforts to protect the orderly distributor from the hostile audience. In Jones v. Board of Regents, plaintiff distributed leaflets on a university campus in violation of a rule; he also wore a sign. "[T]wo members of the crowd were moved to tear the sandwich boards from Jones' body . . . ." The court stated that rather than remove Jones, "police had the obligation of affording him the same protection they would have surely provided an innocent individual threatened, for example, by a hoodlum on the street." 436 F.2d at 621. See also Crews v. Cloncs, 432 F.2d 1259, 1265 (7th Cir. 1970):

> We think a similar principle operates to protect long-haired students unless school officials have actively tried and failed to silence those persons actually engaged in disruptive conduct.

See also Gregory v. Chicago, 394 U.S. 111 (1969) (non-school case); Stacy v. Williams, 306 F.Supp. 963, 977 (N.D. Miss. 1969) (three judge court) (right to invite speakers on campus).

There may be instances where reasonable efforts directed at disorderly persons fail. In such cases it may be necessary to stop, but not punish, the distributor. See Karp v. Becken, 477 F.2d at 176 (confiscation of protest signs upheld in view of reasonable forecast of disruption; however, officials failed to adequately justify five day suspension).



THE STUDENT AS NIGGER

by jerry farber

SECOND & FINAL PART

THE NORTON AND BAKER CASES

The foregoing discussion provides a basis for considering two cases which ruled against students on the disruption issue, Norton v. Discipline Comm. of East Tenn. State Univ., 419 F.2d 195 (6th Cir. 1969), cert. denied, 399 U.S. 906 (1970) and Baker v. Downey City Bd. of Educ., 307 F.Supp. 517, 522 (C.D. Cal. 1969).

In Norton, students were suspended for distributing literature on the campus. The literature referred to administrators in demeaning terms, and a section criticizing student apathy contained language which read, in part, 419 F.2d at 197:

> Have they seized buildings and raised havoc until they got what they were entitled to like other American students? -- No.

The court of appeals in upholding the suspension found that the quoted language supported the district court's finding that the students had "encourage[d] demonstrations similar to those which had occurred on other campuses throughout the country. . . ." 419 F.2d at 197.

The Norton court also held that administrators had reasonably forecast disruption. This ruling was based upon (1) testimony of administrators that "both handouts could conceivably cause an eruption" and that there were "very definite fears that we might have serious consequences," and (2) that after distribution of the first piece of literature some 25 students told a dean they "wanted to get rid of this group of agitators." Id. at 197, 199 (emphasis added). Tinker and the subsequent cases establish that what "could conceivably" or "might" happen is an inadequate basis for limiting expression. Justice Marshall so argued in an opinion joined by Justices Douglas and Brennan in opposing the court's denial of certiorari in Norton. See 399 U.S. at 908. As pointed out by the dissenting judge, alternatives not involving sanctions to the distributors were available to the dean visited by the twenty-five students. 419 F.2d at 207.

In Baker v. Downey City Bd. of Educ., 307 F.Supp. 517 (C.D. Cal. 1969), the court upheld suspensions for "profanity or vulgarity." It also found that distribution of 450 copies of an underground newspaper had been disruptive. The court relied on the following testimony, id. at 522:

> A few teachers testified that there were disruptions in their classes and some testified to the contrary. On cross-examination, Mr. Shiney stated that some 25 to 30 teachers had told him of their classes being interrupted and of failure in attention on the part of students due to their reading of and talking about Oink during class. Mr. Robinson concurred.

This "failure of attention" in the classroom -- by students engaging in private conversations or reading non-germane materials -- is a common problem. In contrast to Baker, the court recognized this issue in the Rowe case, Mem. Op. at 8-9 (footnote omitted):

> The fact that students may think about the newspapers during the class is not a 'disruption' justifying restriction. The dissent made this same point in Tinker, but it was not accepted. The teachers unquestionably have the right to control class discussion and to discipline those who persist in talking about other things or refuse to respond to questions regarding the subject matter of the discussion. These are the narrower, more specific type of restrictions on student communication that are proper and do relate to actual disruption of classwork or discipline.

See also Sullivan I, 307 F.Supp. at 1341. Norton and Baker seem to present a minority view deviating from Tinker more than is necessary.

THE SCHWARTZ CASE AND ITS PROGENY

Three cases uphold the disciplining of student distributors by focusing on a disregard of school regulations and/or defiance to officials. See Schwartz v. Shuker, 298 F.Supp. 238 (E.D.N.Y. 1969); Graham v. Houston Ind. Sch. Dist., 335 F.Supp. 1164 (S.D. Tex. 1970); Sullivan v. Houston Ind. Sch. Dist., 475 F.2d 1071 (5th Cir.), cert. denied, 414 U.S. 1032 (1973) (Sullivan II).

In Schwartz a student was suspended for "insubordination and insolent behavior." He had appeared on campus with copies of an underground paper after the principal had reviewed a previous issue and informed him that it must not be distributed on school grounds. "This issue, among other things, criticized Principal Schuker, referring to him as 'King Louis,' a 'big liar,' and a person having 'racist views and attitudes.'" 298 F.Supp. at 240. The court described the full range of the plaintiff's conduct as follows, 298 F.Supp. at 241:

> When cautioned not to bring on school premises copies of the newspaper, he nevertheless did so; when asked to surrender the same, he refused and in addition attempted to influence another student to do likewise; when suspended from school and told not to report, he nevertheless appeared in school and admitted defiance of the superintendent's orders.

The court upheld the suspension as based on "flagrant and defiant disobedience of the school authorities" rather than "protected activity under the First Amendment . . . ." Id.

The Graham court expressly followed Schwartz holding that the "plaintiffs were reprimanded more for disobedience than for the dissemination of material protected under the first amendment." 335 F.Supp. at 1166. Students had distributed an underground newspaper on campus after two announcements that unauthorized distribution would result in disciplinary measures. The court found an absence of Tinker-style disruption. Id. at 1167. The court characterized as "intransigent" the student's persisting view that they were entitled to distribute and referred to testimony of one student that a "major purpose" had been to "flaunt" the rule. Id. at 1166.

The fifth circuit in Sullivan II, vacating a district court ruling for a student, also expressly followed Schwartz. The court viewed punishment as based upon a "flagrant disregard of established school regulations, . . . open and repeated defiance of the principal's request, and . . . resort to profane epithet . . . ." 475 F.2d at 1076. Here the student had: (1) distributed an underground paper without permission in violation of a widely publicized, written school rule; (2) returned to the campus during a suspension; and (3) twice shouted profanity at his principal within the hearing of others.

Schwartz and Graham raise two important questions: first, should a court uphold a suspension based upon charges covering conduct which is partially protected free speech activity and partially unprotected action? Second, may a student be punished by characterizing as disobedience his breach of an unconstitutional rule? These cases raise each question because of the absence of holdings that all of the conduct on which discipline was based was unprotected, 298 F.Supp. at

241; 335 F.Supp. at 1166, and the describing of the existing distribution rules in terms not fully consistent with the rule later adopted in the respective circuit. Compare Schwartz, 298 F.Supp. at 239-40 and Eisner v. Stamford Bd. of Ed., 440 F.2d at 808, 810-811; and Graham, 335 F.supp. at 1165 and Shanley v. Northeast Ind. Sch. Dist., 462 F.2d at 976-978. If this reading is correct, the cases depart from traditional free expression principles.

Graham in particular raises questions about basing sanctions on the choice of words used to characterize conduct. "Conscientious" could have replaced "intransigent," and "test" could have been used for "flaunt." Tinker involved an almost precisely parallel "flaunting" of rules. 393 U.S. at 735. Cf. Evers v. Dwyer, 358 U.S. 202, 204 (1958) ("That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant.") ("flouting" of law requiring racially segregated seating on buses.)

Sullivan may be read in a manner consistent with these concerns. First, since the prior review requirement which the student breached was roughly consistent with the one approved by the Fifth Cicuit in Shanley, there was apparently no protected free speech activity involved. Second, the court viewed the prior review rule as constitutional, stating, in part, 475 F.2d at 1076:

> And it cannot be seriously urged that this prior submission rule is unconstitutionally vague or overbroad . . . .
>
> . . . [W]e do not invite school boards to promulgate patently unconstitutional regulations governing student distribution of off-campus literature.

Also, Sullivan II cited Healy v. James, 408 U.S. 169 (1972) (college's refusal to recognize a student group), as "approv[ing] the principle that the open disregard of school regulations is a sufficient and independent ground for imposing discipline . . . ." 475 F.2d at 1076. Healy refers to "reasonable" and "valid" rules. 408 U.S. at 193-194.

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LITERATURE DISTRIBUTION

RULES OF TIME, PLACE AND MANNER

Tinker was silent on the standards to be used to determine rules regulating the time, place or manner of distribution. The only clue it provides was a reference to "the cafeteria," "the playing field" and "the campus during the authorized hours." The decision also discussed the inadequacy of sham opportunities for expression. 393 U.S. at 512-513. The best view would be to extend the Tinker test and require that time/place limitations be closely tied to particular and specific problems relating to the school's need to run an educational program. This standard was in fact applied in Grayned v. Rockford, where the Supreme Court considered the applicability of an anti-noise ordinance to a demonstration adjacent to a school. After noting that free speech activity could be subjected to reasonable time, place and manner rules, the court analyzed the ordinance in terms of the Tinker disruption standard suggesting that it is a particularization of the time, place and manner rule. 408 U.S. 104, 115-119 (1972). Thus, it would be reasonable to ban leafletting on stairways between periods, if conditions were such that the leafletting made students late for class. It would also seem reasonable to ban such activity in a classroom while class is in session, for obvious reasons.

The student literature cases have generally agreed that distribution may be limited by reasonable rules of time, place and manner. E.g., Riseman v. School Comm. of Quincy, 439 F.2d at 149, n.2; Shanley v. Northeast Ind. Sch. Dist., 462 F.2d at 969; Fujishima v. Bd. of Ed., 460 F.2d at 1359. In two cases, courts have rejected attempts to uphold broad prohibitions as mere time, place and manner regulations. Jones v. Board of Regents, 436 F.2d at 620-622; Rowe v. Campbell Union High Sch. Dist., Civil No. 51060 at 5-6 (N.D. Cal. Nov. 10, 1970). See also Hernandez v. Hanson, Civil No. 75-0-174 (D. Neb. May 21, 1975) (Clearinghouse No. 16,126) (specifying areas and times within school where leaflets could be distributed).

But few have presented a direct opportunity to discuss the standard for determining reasonableness. The court in Sullivan I would apparently apply the Tinker standard, for in dicta it observed, (307 F.Supp. at 1340):

> Obviously, the first amendment does not require that students be allowed to read newspapers during class periods. Nor should loud speeches or discussion be tolerated in the halls during class time. A proper regulation as to "place" might reasonably prohibit all discussion in the school library.

Likewise, dictum in Rowe counsels against excessive vigor in the manner of distribution. "Were one student to attempt to force material on another, he could be disciplined. There is no evidence whatsoever this has occurred." Rowe, at 7. See also Shanley, 462 F.2d at 970, 971 n.8; Jacobs v. Board of Sch. Comm'rs, 349 F.Supp. 605, 611 (S.D. Ind. 1972), aff'd, 490 F.2d 601 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975). (". . . not coercive of any other person's right to accept or reject any written material. . . ."); Tinker, 393 U.S. at 504 n.1.

There have been only a few cases which have presented a direct issue concerning time, place, or manner regulations. In Riseman, the first circuit reversed a lower court order limiting distribution to "school premises outside of school buildings . . . ." 439 F.2d at 149. The appellate court approved 'orderly and not substantially disruptive distribution' by students not engaged in regular school duties "on the school grounds . . . includ[ing] within the buildings . . . ." The court also authorized issuance of reasonable rules of time, place and manner. 439 F.2d at 149 n.2. Relief in accord with Riseman was entered in Mello v. School Comm. of New Bedford, Civil No. 72-1146 (D.Mass., April 6, 1972) (temporary restraining order). The orders entered in Sullivan and Jacobs are consistent with Riseman. They require a showing of disruption of the school program to support limitations on distribution before and after school and at other times when students are not engaged in regular school duties. 333 F.Supp. at 1152; 349 F.Supp. at 611. See also In re Schiener, 11 N.Y. Ed. Rept. 293, 294 (N.Y. Ed. Comm'er, 1972) (limiting distribution of underground paper to school exits at dismissal is unreasonable). Rowe v. Campbell Union High Sch. Dist., at 6. ("[T]he argument that the existence of an alternative forum or mode of expression permits suppression of the chosen one has consistently been rejected.") See also Schneider v. New Jersey, 308 U.S. 147, 163 (1939); New Times, Inc. v. Arizona Bd. of Regents, 110 Ariz. 367, 519 P.2d 169 (1974) (university cannot limit distribution of off-campus newspaper to six sites on campus and require the payment of a fee for the right to distribute each issue.)

A grossly invalid rule in Vail v. Board of Educ. of Portsmouth Sch. Dist banned all literature distribution anywhere within 200 feet of the school. The district court enjoined defendants from further enforcement of the rule and voided all disciplinary actions taken pursuant to the rule. 354 F.Supp. 592 (D.N.H. 1973). The Board then adopted a new rule which permitted students to place their materials on a table in a library alcove for up to ten days at a time, and to either give away or sell materials outside the school building at the end of each daily session, with a stipulation that these activities do not interfere with normal egress from the buildings. The plaintiffs sought new relief, feeling that the table was too difficult to find, and that the opportunity for distribution at the end of the day was too limited because students left hurriedly at the end of each session to catch their busses. In response, the district court requested the parties to make a good faith settlement, and expressed a general opinion that the new rule was too restrictive, and could be improved by allowing distribution before and after the daily sessions without time limitations. The court saw no objection to the location of the library table and viewed the school's concern for normal traffic flow as reasonable. The parties failed to settle the matter amicably, however, and the plaintiffs appealed. The matter was remanded for fuller relief. 502 F.2d 1159 (1st Cir. 1973). A copy of the unpublished circuit court memorandum, which by a rule of the first circuit is not to be treated as a precedent for any other case, is available from the Law and Education Center.

On remand, the trial court signed a stipulated order which provided that literature could be distributed before and after the student's school day, or during any free period, on school grounds, in the foyer and at the various resource centers. It is included as an appendix to this note, infra, at 75-79.

The only cases where manner of distribution was a real issue are those involving sales (or contributions) rather than free distribution. In Jacobs, the trial court invalidated a rule forbidding sales. 349 F.Supp. at 610. The appellate court observed that sales by students are permissible, and added that defendants would have the burden of proof of showing that sales would be disruptive under the Tinker standard 490 F.2d at 608. See also Peterson v. Board of Educ., 370 F.Supp. 1208 (D. Neb. 1973); Vail v. Board of Educ. of Portsmouth Sch. Dist., consent order (p.75, infra). Cf. Scoville v. Board of Ed., 425 F.2d 10 (7th Cir.), cert. denied, 400 U.S. 826 (1970) (The fact that the materials were sold was not even an issue).

Fujishima deals with several questions of time, place and manner. There, the court invalidated a suspension for distribution during a fire drill because the system's rule was unconstitutional and there was no proof of disruption of the drill. The court stated that the board might prohibit such distribution as a regulation of time and place. 460 F.2d at 1355. There is a reasonable basis for seeking order during a drill to protect safety and expedite the return of students to classes. Such a limitation will have a limited impact on expression given the infrequency of fire drills. The Fujishima court also stated that a system may not require students to seek in advance of each distribution approval of the time, place and manner. "The board has the burden of telling students when, how and where they may distribute materials." 460 F.2d at 1359.

There is a danger that regulations of time, place and manner will not remain neutral, and will be used to censor content. To compensate for this danger, it is necessary also to have high standards of specificity in the regulation and to strictly limit administrative discretion. See the material on overbreadth, at Part III (A) (6), infra; see also Monaghan, First Amendment, "Due Process", 83 HARV. L. REV. 518, 539-43 (1970).

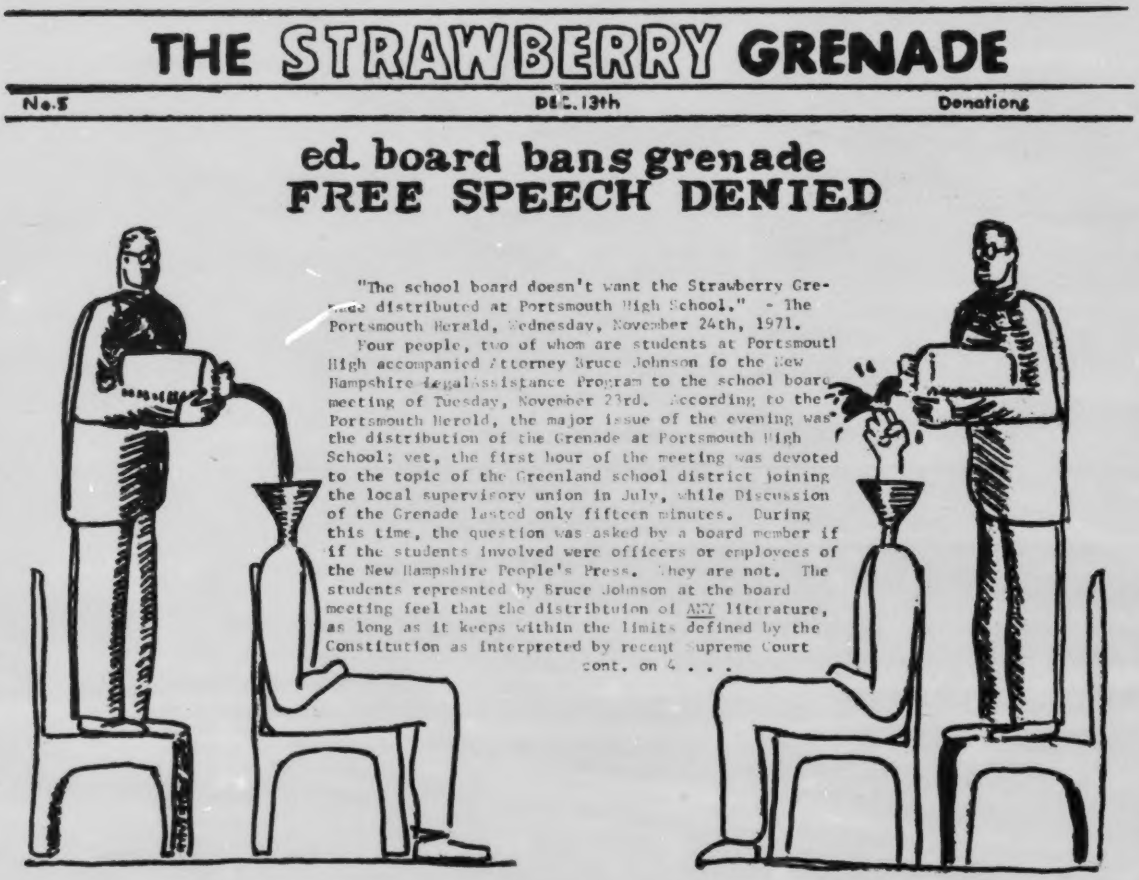
UNPROTECTED UTTERANCES

It has long been a majority view of the Supreme Court of the United States that certain kinds of utterances will not be deemed speech within the terms of the first amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). However, the fear that governmental restrictions on these unprotected utterances will intrude into protected areas has led the Supreme Court to develop special rules governing the definitions and the burden of proof and persuasion which greatly narrow the permissible scope of such restrictions. As will be discussed below, these special rules should apply to students in school as well as all citizens generally.

Finally, if students in school have full first amendment rights all other utterances are fully protected. Certainly, protection of materials is not limited to those which a court determines to be of "sufficient social importance." Hatter v. Los Angeles City High Sch. Dist., 452 F.2d 673, 675 (9th Cir. 1971).



THE STRAWBERRY GRENADE

No.5 DEC. 13th Donations

ed. board bans grenade
FREE SPEECH DENIED

"The school board doesn't want the Strawberry Grenade distributed at Portsmouth High School." - The Portsmouth Herald, Wednesday, November 24th, 1971.

Four people, two of whom are students at Portsmouth High accompanied Attorney Bruce Johnson fo the New Hampshire Legal Assistance Program to the school board meeting of Tuesday, November 23rd. According to the Portsmouth Herold, the major issue of the evening was the distribution of the Grenade at Portsmouth High School; yet, the first hour of the meeting was devoted to the topic of the Greenland school district joining the local supervisory union in July, while Discussion of the Grenade lasted only fifteen minutes. During this time, the question was asked by a board member if if the students involved were officers or employees of the New Hampshire People's Press. They are not. The students represnted by Bruce Johnson at the board meeting feel that the distribtuion of ANY literature, as long as it keeps within the limits defined by the Constitution as interpreted by recent Supreme Court

cont. on 4 . . .

Replica of The Strawberry Grenade courtesy of P.M. Lines (the original was on magenta-colored paper.)

OBSCENITY

Obscenity has long been regarded as among utterances which are beyond the protection of the first amendment. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). However, the court has also developed a narrow and technical definition of obscenity, to assure that legal prohibitions on it do not intrude upon protected speech. Thus, under the present standard the basic guidelines for the trier of fact must be:

> . . . (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, [408 U.S. 229] at 230 quoting Roth v. United States, [354 U.S. 476] at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct, specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973). Later in the opinion, the court referred to "the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain . . . ." Id. at 35. But these are non-school decisions.

The lower courts have readily agreed that students in schools are not privileged under the first amendment to publish or distribute obscene material. See, e.g., Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960, 971 (5th Cir. 1972), Jacobs v. Board of Sch. Comm'rs, 349 F.Supp. 605, 610-11 (S.D. Ind. 1972), aff'd, 490 F.2d 601 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975). The significant question is whether the technical definition of obscenity applies or material may be prohibited because it is vulgar, profane or contains "four letter words."

The Supreme Court resolved the issue at the college level in Papish v. Board of Curators, 410 U.S. 667 (1973). There, a student was expelled after distributing on campus, without ensuing disruption, an underground newspaper containing a political cartoon showing policemen raping the Statue of Liberty, and an article entitled "Mother Fucker Acquitted." The lower courts upheld the expulsion. The district court found the paper obscene; the court of appeals found it unnecessary to reach that question because "on a university campus 'freedom of expression' could properly be 'subordinated to other interest such as, for example, the conventions of decency . . . .'" 410 U.S. 667, 669, quoting the court of appeals, 464 F.2d 136, 145 (8th Cir. 1972). The Supreme Court reversed, 410 U.S. at 670 (footnote omitted):

> We think Healy [v. James, 408 U.S. 169 (1972)] makes it clear that the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name alone of 'conventions of decency.' Other recent precedents of this court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labelled as constitutionally obscene or otherwise unprotected. E.g. Kois v. Wisconsin, 408 U.S. 518 (1972); Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971)["Fuck the Draft" not obscene].

Papish in effect overrules Norton v. Discipline Comm. of East Tenn. State Univ., 419 F.2d 195 (6th Cir. 1969), cert. denied, 399 U.S. 906 (1970), insofar as any reliance was placed in Norton on distribution of materials containing "crude, vulgar remark[s]"--plainly not legally obscene--in upholding suspensions. See 419 F.2d at 198. See also Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973)(university cannot discipline student who wrote and editor who published letter containing one "four-letter" vulgarity.)

Papish, a college case, does not completely resolve the standard for high school students for two reasons. In Ginsberg v. New York, 390 U.S. 629, 636 (1968), the court accepted the notion of differential standards of obscenity depending upon age. Second, some cases have suggested a distinction between college and high school students. E.g., Quarterman v. Byrd, 453 F.2d at 57-58 and n. 7; Koppell v. Levine, 347 F.Supp. 456 (E.D.N.Y. 1972). It may be argued from Ginsberg, however, that something approaching the legal definition for adults applies.

Generally, high school students have prevailed on obscenity issues. Courts have found materials not obscene employing the same standard used in Papish and/or have found insufficient basis for distinguishing student expression from materials which are part of the school program. The one exception to this pattern, Baker v. Downey City Bd. of Ed., 307 F.Supp. 517 (C.D. Cal. 1969) is discussed below.

In two cases, courts applying the technical definition of obscenity held that particular non-school-sponsored publications were not obscene. See Vail v. Board of Ed., 354 F.Supp. at 599: Sullivan v. Houston Ind. Sch. Dist., 333 F.Supp. at 1162-1167, supplementary injunctions vacated on other grounds, 475 F.2d 1071 (5th Cir. 1973). Each of these cases involved the word "fuck." In Fujishima, the seventh circuit stated that rules could forbid obscenity and added (460 F.2d at 1359 n. 7):

> Defendants here do not argue that The Cosmic Frog is obscene, but some school administrators have labeled as obscenity the sort of profanity and vulgarisms which appears in The Cosmic Frog. They are incorrect, because those words are not used to appeal to prurient sexual interests. See Sullivan v. Houston Independent School District, 333 F.Supp. 1149, 1162-1167 (S.D. Tex. 1971).

See also Jacobs v. Board of Sch. Comm'rs, 349 F.Supp. 605 (S.D. Ind. 1972), aff'd, 490 F.2d 609-610 (7th Cir. 1973) (technical definition of obscenity applicable), vacated as moot, 420 U.S. 128 (1975) ; Scoville v. Board of Educ., 425 F.2d at 14 (appearance of sentence "oral sex may prevent tooth decay" not a basis for sanction). See also Koppell v. Levine, 347 F.Supp. 456, 458-59 (E.D. N.Y. 1972) and Antonelli v. Hammond, 308 F.Supp. 1329, 1332 (D. Mass. 1970), cases involving school-sponsored publications discussed below.

In Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973), cert. denied, 416 U.S. 995 (1974), the court reviewed the attempted censorship of a semi-official magazine (staffed and run by students, with editorial advice from an English department adviser) at the University of Mississippi. There was never any conflict over content until the University's printers superintendent called the chancellor to suggest that he examine the stories. At issue were two short stories by a young black student on interracial love and black pride. The university based its objection on taste --chiefly referring to some "earthy" language, including some "four-letter words." The circuit court observed, id. at 573:

> The language, while admittedly unacceptable in some quarters, is readily recognized as commonplace in various strata of society, both black and white. . . . [I]t could well be considered strained and artificial for these characters to speak and think in proper prep school diction.
>
> . . . The words are not used in a sexual sense nor are there vulgar passages describing such activities. Throughout the work, the "offensive" words are usually used as modifiers strictly included for their effect and to convey a mood. They are not used in any literal sense. While some may feel that they are used a bit too often, this is a difficult matter to judge and rests largely with individual taste. Certainly, it seems an unsuitable standard for governmental censorship.

The court held the censorship attempt improper, and it was notified on another point and affirmed by the fifth circuit en banc, 489 F.2d 225 (5th Cir. 1973), cert. denied 416 U.S. 995 (1974).

Courts have been unwilling to uphold sanctions based on students' using words which also appeared in school-sanctioned materials. In Vought v. Van Buren Pub. Sch., 306 F.Supp. 1388 (E.D. Mich. 1969), a student was expelled for possessing in school a "24 page tabloid-type" publication in violation of a school regulation forbidding possession of obscene literature. The student conceded that the magazine contained some "obscene" words, e.g., "fuck." (The concession is questionable in view of the other cases.) The proof revealed that J.D. Salinger's THE CATCHER IN THE RYE and an issue of Harper's used in the school program contained the same word. The court held, id. at 1396:

> . . . the inconsistency is so inherently unfair as to be arbitrary and unreasonable, constituting denial of due process, thus compelling us to conclude that the plaintiff's expulsion may not stand.

See also Channing Club v. Board of Regents, 317 F.Supp. 688 (N.D. Tex. 1970)(denial of equal protection; university attempt to prohibit publication of off-campus paper); Sullivan v. Houston Ind. Sch. Dist., 333 F.Supp. at 1165-1167 (S.D. Tex 1971) (partial basis of decision), supplementary injunctions vacated on other grounds, 475 F.2d 1071; Scoville v. Board of Ed., 425 F.2d at 14 (appropriate to compare content of books in school library). The eighth circuit majority refused to rely on the inconsistency doctrine in the Papish case. See 464 F.2d at 144 and n. 18. The dissenting judge appeared to disagree. (464 F.2d at 146 and n. 1) In the view it took of the case, the Supreme Court did not reach the issue in reversing. See Papish v. Board of Curators, 410 U.S. 667 (1973).

The inconsistency doctrine is a potent, widely available weapon. In the Vail case, for example, a comparison of the content of the underground paper (The Strawberry Grenade) and materials from the school program revealed the following:

> Erich Segal, LOVE STORY (Signet Edition 1970), at p.68: "For whom? I wanted to say. This guy was beginning to piss me off."
>
> Strawberry Grenade, November 11, 1971, at p. 1: "Many of us were getting pissed off."
>
> LOVE STORY, at p. 17: "At a heated juncture, I made the unfortunate error of referring to their center as a 'fucking Canuck.'"
>
> Strawberry Grenade, November 11, 1971, at p. 2: "All I remember about the ride downtown is screaming at the pigs to please loosen the fucking handcuffs as they hurt like hell."
>
> Eldridge Cleaver, SOUL ON ICE, Dell Publishing Co., Inc., (1970) at p. 182: "I'm gon' cut that fucking weed aloose."
>
> Dick Gregory, with Robert Lipsyte, NIGGER, Pocket Books, 1965, at p. 171: "I'm gonna cut the balls right off this little nigger, he ain't never gonna do nothin' no more."

Strawberry Grenade, Nov. 11, 1971, at p.3: "So I hit him in the balls."

NIGGER, at p. 22: "Dare any dirty mother-fucker in this place to come and stop me from stomping this bitch. Hear?"

Strawberry Grenade, Nov. 11, 1971, at p. 3: "You've had it now, mother-fucker!"

Particular words at issue in Vail were also defined in standard reference works.*

After the Supreme Court's reversal in the Papish case, Baker v. Downey City Bd. of Educ., stands alone in ruling punishment permissible for material not found legally obscene. High school students received ten day suspensions for "profanity or vulgarity" after distributing 450 copies of Oink, an underground paper, to students entering the campus. Offending material included "four letter words" and other profanity in an article by Jerry Farber, "The Student as Nigger," and the "vulgar retouching" of a photograph of President Nixon (adding an extended middle finger to a closed hand). This photograph was captioned: "Here's A Little Something For You Justice." 307 F.Supp. at 520, 529-30.

The Baker court's rationale for denying the free speech claim was similar to that of the court of appeals majority in Papish:

> Neither "pornography" nor "obscenity," as defined by law, need be established to constitute a violation of the rules against profanity or vulgarity, or as a reason for interference with discipline, or to justify the apprehension of experienced school administrators as to the impairment of the school's educational process in the instant case. Ginsberg v. New York, 390 U.S. 629 . . . .
>
> . . . .
>
> . . . [P]laintiff's First Amendment rights to free speech do not require the suspension of decency in the expression of their views and ideas.

307 F. Supp. at 526-27. The court also stated that high school students' "right to criticize and to dissent" may be "more strictly curtailed . . . than college students or adults". Id. at 527.

Significantly, the appellate court in Papish relief on Baker as authority. See 464 F.2d 136, 145, n. 20 (8th Cir. 1972). Papish, of course, was reversed by the Supreme Court.

Non-school cases also require a full adversary hearing prior to seizure or censorship. This principle has been applied in one school case. Wilhelm v. Turner, 431 F.2d 177 (8th Cir. 1970). Iowa's Attorney General secured copies of a student paper from a printer prior to distribution, claiming that the paper was obscene. The court held the papers must be returned to the student plaintiffs because seizure had not been preceded by an adversary hearing on the obscenity issue. Id. at 179-80.

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*E.g., AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (American Heritage Publishing Co., Inc., 1969) at p. 531: "fucking, adj. Vulgar slang. Damned. Used as an intensive. adv. Vulgar Slang. Very. Used as an intensive." DICTIONARY OF AMERICAN SLANG, (Wentworth and Flexner, Crowell Co., 1967) at p. 393: "pissed off--angry; enraged; disgusted; completely and thoroughly exhausted; fed up; unhappy; forlorn.

DEFAMATION

Like obscenity, defamatory utterances are also generally considered beyond the protection of the first amendment. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) (*dicta*). This general principle has been repeated by courts deciding school cases. See *e.g.*, *Shanley v. Northeast Ind. Sch. Dist.*, 462 F.2d 960, 971 (5th Cir. 1972); *Fujishima*, 460 F.2d 1355, 1359 (7th Cir. 1972).

Like obscenity, however, the Supreme Court has imposed numerous restrictions on the common law concept of defamation, which, generally speaking, is any communication to a third party "which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided." Prosser, LAW OF TORTS 739 (5th ed. 1971); Hanson, LIBEL AND RELATED TORTS, para. 14 at 21-22 (1969).

Under the common law definition, liability followed if the defamatory statement was in fact published; there was no requirement that the speaker act negligently or with intent to defame. The classic case imposing constitutional limits on the common law definition of defamation is *New York Times v. Sullivan*, 376 U.S. 254 (1964). The defendant publisher ran a full-page advertisement which described racial atrocities perpetrated by unnamed persons (or organizations) in the South. Sullivan, who was an elected commissioner with responsibility for the police department of Montgomery, Alabama, believed that the statements implicitly attacked him and injured his reputation. During the course of the trial, some of the assertions contained in the advertisement were shown to be false: the *Times* morgue carried stories which were inconsistent with the advertisement and the *Times* admitted that some of the statements were false. This forced the *Times* to rely exclusively on its first amendment protections.

The High Court ruled that public officials were subject to fair comment, and would have the burden of proving that an alleged defamatory statement was both untrue and made with "actual malice" --*i.e.*, intentional or reckless disregard for the truth. 376 U.S. 254, 779-780 (1964). The court reversed a state court decision awarding damages to Sullivan and remanded the case for further consideration in light of this new principle. Subsequently, the court also made it quite clear that "actual malice" did not mean "ill will" in *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964):

> . . . even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.

Soon after *Sullivan*, it became clear that the *Sullivan* formula would extend to all public officials, not just those who were elected to their positions. *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (county parks department supervisor); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (candidates for office).

Finally, the *Sullivan* rule was extended to lower echelon public personnel in *Time, Inc. v. Pape*, 401 U.S. 279 (1971)(a Chicago policeman).

The court has also extended the *Sullivan* "actual malice" test to "public figures"--persons who voluntarily assumed a position of leadership. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (a former collegiate football coach) and *Associated Press v. Walker*, consolidated with it,(a prominent spokesman during a riot at the University of Mississippi). In *Butts/Walker* the court left open the question of whether the "reluctant public figure" was subject to the same fair comment as public officials. This issue was resolved in Gertz v. Robert Welch Inc., 418 U.S. 323 (1974). Gertz was a Chicago lawyer who was described unfavorably by the defendant's magazine. Powell, who wrote the opinion for the court, continued to recognize a category of public figures, first noted in Butts/Walker. Powell also rejected an earlier inconsistent opinion (Rosenbloom v. Metromedia, Inc.,403 U.S. 29 (1971)) on grounds that it was only a plurality opinion. He then acknowledged that the first amendment requires some concessions and some accommodation, and declared the common law libel *per se* rule and the rules permitting punitive damages unconstitutional. Most important, he refused to require proof of actual malice, as defined in Sullivan, 418 U.S. at 347:

> We hold that, so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

Thus, an instruction on reasonable care was found adequate.

In sum, in cases involving private persons as the subject of the defamation, the Gertz majority desires to see (1) evidence of negligence, not just falsehood; and (2) a record reflecting evidence of actual injury to plaintiff.

In cases where school officials seek to deny a student's right to publish or distribute materials on grounds that it is defamatory, the question likely to arise is whether the definition of defamation must be judged by the Sullivan-Gertz rules. Since prior censorship of defamatory materials is highly questionable, Near v. Minnesota, 283 U.S. 697 (1931), the proper analysis would preclude any interference, and would require those persons who believed they were defamed to bring a tort action. The only case dealing precisely with school officials' attempt to punish alleged defamation in a school paper involved a faculty dismissal. Endress v. Brookdale Community Col., Civil No. C-180S-74 (N.J. Super. Ct., April 30, 1975). A faculty member had written a story which charged a college official with a conflict of interest. The court required the board to prove that she acted with actual malice before they dismissed her. Id. at 17. They failed. Id. at 18. The court granted Endress's request for specific performance of her contract, with full salary privileges and damages. The court allowed $10,000 compensatory damages, $10,000 in attorney's fees, and punitive damages of $10,000 against each defendant (a total of $70,000 and costs).

If defamation suits are brought against students they would, of course, have to be adjudicated according to the constitutional rules set forth by the Supreme Court. Cf. Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973)(obscenity case); Trujillo v. Love, 322 F.Supp. 1266, 1271 (D. Colo. 1971) (college newspaper); discussed at p. 67, *infra*.

The New York Times rule was in part the basis for the dismissal of a libel action in Scelfo v. Rutgers Univ., 116 N.J. Super.403, 282 A.2d 445 (1971). There, a student wrote an article describing a YAF-SDS confrontation and submitted it to the undergraduate newspaper. It was published with a headline reading: "YAF's, Cops, Rightists: Racist Pig Bastards." The court dismissed the suit for three reasons: (1) failure of the article to identify the two policemen who sued the student author and the university; (2) the absence of proof of damage to the plaintiff's reputations; and (3) the policemen were public officials, and failed to plead or present evidence of 'actual malice' as required by the Times case. Id. at 449-51.

For a general discussion of the subject of school liability for student utterances, see Note, Tort Liability of a University for Libelous Material in Student Publications, 71 MICH. L. REV. 1061 (1973). Very few cases have ever been filed against universities for tortious statements in the school paper, and in the cases filed, the utterances were found to be priviledged.

CRITICISM OF SCHOOL OFFICIALS

The non-school Supreme Court cases which most closely parallel the situations where students are critical of school officials are those cases dealing with "fighting words." In such cases, where speech alone is involved, the Supreme Court has required that the words clearly be likely to provoke a riot or breach of peace. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Cf. Terminiello v. Chicago, 337 U.S. 1 (1949). The Supreme Court in non-school cases has required a "clear and present danger" that a substantial evil would occur. E.g., Bridges v. California, 314 U.S. 252, 261-62 (1941), and "minor matters of public inconvenience or annoyance" are insufficient to justify restrictions on free speech. Id. at 263:

> [T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

It is grossly insufficient merely to show that "a few students made hostile remarks". Tinker, 393 U.S. at 508. "[A] mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," id. at 509, is also inadequate justification for a curtailment of free speech. See also Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576, 13 (1969). If punishment is invoked merely because speech "stirred people to anger, invited public dispute, or brought about a condition of unrest," it is invalid. "A conviction resting on any of those grounds may not stand." Terminiello v. Chicago, 337 U.S. 1, 5 (1949).

The law expects public servants to restrain themselves from reacting violently when dealing with provocative citizens. Cf. Model Penal Code, 250.1 (4) (c) (Tent. Draft. No. 13, 1961) (police); Oratowski v. Civil Serv. Comm'n of Chicago, 3 Ill. App. 2d 551, 123 N.E. 2d 146, 151 (1954) (same). This rule, developed in the context of words directed at police, should also apply to teachers and school administrators. In a normal school atmosphere, their first duty is to exercise restraint and provide a good example to the students in the school. Of course, where the criticism is directed at other students Tinker's standard should apply, as a particularization of the test developed in non-school cases.

A limited number of the distribution cases concern the question of criticism of school officials Generally the courts hold that broad prohibitions on distribution may not be justified by a fear that student publications will be critical of school officials. Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960, 972, n. 10 (5th Cir. 1972) (dicta);Rowe v. Campbell Union High Sch. Dist., Civil No. 51060 (N.D. Cal. Nov. 10, 1970). See also Sullivan v. Houston Ind. Sch. Dist., 307 F.Supp. 1328, 1341 (S.D. Tex. 1969) (Sullivan I);Scoville v. Board of Educ., 425 F.2d 10, 14 (7th Cir. 1970) cert. denied, 400 U.S. 826 (1970); and Norton v. Disc. Comm. of East Tenn. State Univ., 419 F.2d 195, 198 (6th Cir. 1969), cert. denied, 399 U.S. 906 (1970).

This view was reiterated by Chief Justice Burger dissenting in Papish: "Students are, of course, free to criticize the university, its faculty, or the Government in vigorous, or even harsh, terms." 410 U.S. 667, 672 (1973). In Baughman, the court stated that officials may not "under the guise of . . . vague labels . . . choke off criticism, either of themselves, or of school policies, which they find disrespectful, tasteless, or offensive." 478 F.2d at 1351.

In Sullivan I, the court stated that a speech by a "hypothetical administrator" in an underground paper did "appear to hold school officials up to ridicule . . . ." It could not be suppressed, however, because it did not contain "fighting words," libel or obscenity. 307 F.Supp. 1328, 1341, 1342 (S.D. Tex. 1969). In one case, university officials took exception to a letter written by two students which contained a "four-letter" epithet describing the president of the university. The students were disciplined. The reviewing court ruled the college's action illegal in a very brief opinion, Thonen v. Jenkins, 491 F.2d 722, 723 (4th Cir. 1973):

> The record reveals that university officials undertook to deny these college students the right to continue their education because one word in an otherwise unexceptionable letter on a matter of campus interest was deemed offensive to good taste. On at least one prior occasion the officials had remonstrated with the student editors about the use of vulgarity in the publication but had made it clear that they did not intend to act in a censorial fashion nor did they suggest that such vulgarity would not be tolerated in the future. It was only when the vulgarity was used in the open letter addressed to President Jenkins with respect to his dormitory policy that the school authorities viewed it as totally unacceptable and took disciplinary action against Thonen and Schell. That they may not do.

ADVOCACY OF VIOLATION OF SCHOOL RULES

Sometimes criticism of officials becomes so harsh it becomes advocacy of disobedience. The non-school parallel to the situation where students' speech appears to urge some illegal or improper action are the cases dealing with subversion, advocacy of the overthrow of the government and inciting to riot.

The general rule that has been developed in such cases was enunciated in Schenck v. United States, 249 U.S. 47 (1919), in which the court upheld a conviction for obstructing the draft by mailing pamphlets urging conscripts to resist during a time of war. The court, speaking through Justice Holmes, enunciated the following rules, id. at 52:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

The "clear and present danger" test was applied to uphold convictions under the Smith Act, prohibiting subversive activities, in Dennis v. United States, 341 U.S. 494, 509 (1951):

> Obviously, the words mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. It Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.

The test remains in effect today. Brandenburg v. Ohio, 395 U.S. 444 (1969). In Brandenburg, the Court voided Ohio's criminal syndicalism act which made it a crime to orally or in writing "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform," or to "voluntarily assemble" with a group that does. The court cited Dennis and similar cases and observed, id. at 447:

> These . . . decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

In another case a student demonstration which began on campus moved to the street, blocking traffic. The local sheriff ordered the demonstrators to move. Hess shoulted, "We'll take the fucking street later" or words to that effect and was arrested under a disorderly conduct statute. The court reversed, observing that Hess was being punished for words alone and that there was no likelihood of imminent lawless action.

> Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished.

Hess v. Indiana, 414 U.S. 105, 108-09 (1973).

In Healy v. James, 408 U.S. 169, 188-89 (1972), the Supreme Court considered, among other reasons, a college's refusal to recognize an SDS chapter because it would be a disruptive influence on campus. The court applied the following legal standard:

> This critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 . . . (1969) (unanimous per curiam opinion). See also Scales v. United States, 367 U.S. at 230-232 . . . [1961]: Noto v. United States, 367 U.S. 290-298 . . . (1961); Yates v. United States, 354 U.S. 298 . . . (1957). In the context of the "special characteristics of the school environment," the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." Tinker v. Des Moines Independent Community School District, 393 U.S. at 513 [1969].

See also Stacy v. Williams, 306 F.Supp. 963, 972-974, 977 (N.D. Miss. 1969) (three judge court) (right to invite speakers).

In a school case, In re Brociner, 11 N.Y. Ed. Rept. 204 (N.Y. Ed. Comm'r 1972), a student was suspended for distributing an underground paper which included the following advice for freshman students. In the words of the Commissioner:

> The "advice" includes a list of "do's" and "don'ts" "to help make your stay more pleasurable and to drive the administration crazy" and includes suggestions that the students learn to steal passes and to forge teachers' signatures upon the pass, to lie with a straight face, to sign their own absence excuse notes and to "do your part to drive the 'Wheels' up the wall."

The Commissioner ruled for the student. The critical factor in the decision was the Commissioner's finding that the article was intended as satire, and that "satire, however inept" is protected by "constitutional guarantees" and "the dictates of sound educational policy." *Id.* at 205:

> . . . It is nevertheless apparent to me that the piece was written as a work of satire rather than as a serious exhortation. . . .

The opinion also notes "a complete absence of proof that any students were influenced by the article to do or to attempt the acts suggested. *Id.* at 207.

In *Scoville v. Board of Educ.*, 425 F.2d 10, 14 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970), the students harshly criticized school policies and a dean, and urged other students to destroy or not accept materials given out by required administrators. The court of appeals ruled for students because it found no evidence of actual disruption, and viewed the criticism (although "disrespectful and tasteless") and advocacy as insufficient to support a reasonable forecast of disruption.

In *Norton v. Disc. Comm. of East Tennessee State Univ.*, 419 F.2d 195, 197 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970), the court ruled in favor of school administrators against student publishers who criticized student apathy and indirectly suggested they should have "seized buildings and raised havoc . . . like other American students." Whether the court properly applied the Tinker standard is discussed *supra* at pp. 41-42.

In any case, the court found that administrators had reasonably forecast disruption. In the court's view, some of the student literature encouraged disruptive demonstrations. 419 F.2d at 197. The court also referred to exhortations to students "to stand up and fight" and to "assault the bastions of administrative tyranny." These the court characterized as "open exhortation to the students to engage in disorderly and destructive activities." 419 F.2d at 198.

In one sense, Scoville and Norton are consistent. Neither case stops with criticism and advocacy; each searches for evidence of their impact. Finding none, Scoville ruled for the students. However, Norton rested primarily on testimony of what "could conceivably" and "might" happen. This is not a valid point. Even in the absence of testimony, the court of appeals in Scoville could have inferred that disruption was "conceivable" and "might" happen. The real difference manifest in the courts' contrasting choice of language to describe student expression was in the philosophy of judges. This note has observed that Norton did not properly apply Tinker's disruption standard. In addition, given the indication in the Healy case that advocacy must be tested by the standard set forth in Brandenburg, the Norton decision is questionable on another ground. The university officials did not testify that distribution was "likely to incite or produce" disruption of the school program.[1]

Two cases where the Tinker test was adequately met are illustrated by Siegel v. Regents of Univ. of Cal., 308 F.Supp. 832 (N.D. Cal. 1970)("go down there and take the park"); and Speake v. Grantham, 317 F.Supp (S.D. Miss. 1970) (leaflets falsely announcing the suspension of classes). On the factual contents of both cases "substantial disruption" could clearly be predicted.

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[1] The cases on student criticism have not discussed the applicability of the doctrine of Pickering v. Board of Education, 391 U.S. 563 (1968). There, the Court overturned the dismissal of a teacher who had criticized the school board and administration's handling of the raising and allocating of revenue. There was no proof of adverse impact on the educational program and the Court found that none could be inferred given the subject of the criticism. 391 U.S. at 572-573. It also found that the information used by the teachers was not confidential and that since "[t]he statements [were] in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher" there was "no question of maintaining either discipline by immediate superior or harmony among coworkers . . . ." 391 U.S. at 569-570. In these circumstances, the court held: (1) "substantially correct" comments could not be the basis for dismissal even if "sufficiently critical in tone . . . ." 391 U.S. at 570; (2) "in a case such as this" the "false" statements found by the Court could not be a basis for dismissal unless "knowingly or recklessly made . . . ." No such showing was made. 391 U.S. at 574. This summary shows the complexity of the Pickering analysis. Pickering also introduces another factor, stating that the system because of the employer-employee relationship had significantly different interests than in regulating the speech of the "citizenry in general." 391 U.S. at 568. It can be argued that students are the "citizenry in general" and that there is greater latitude for student criticism.

COMMERCIAL MATERIAL

Non-school Supreme Court cases have also excluded advertising materials from the protection of the first amendment. See Valentine v. Chrestensen, 316 U.S. 52 (1942); Pittsburgh Press Co. v. Pittsburg Comm. on Human Relations, 413 U.S. 376 (1973). This would serve as justification for limiting or prohibiting of advertising circulars on school grounds (Cf. Valentine) and would support reasonable regulations of how advertising is presented (Cf. Pittsburgh Press Co.).

In Peterson v. Board of Educ. of Sch. Dist. No. 1 of Lincoln, Neb., 370 F.Supp. 1208 (D. Neb. 1973), the court refused to apply this doctrine to a publication which contained advertising material in it. The court observed that the primary emphasis of the newspaper was not commercial advertising, but the other material, and that the school had not been even-handed in applying its anti-advertising ban, and had permitted other newspapers containing advertisements on school premises. (There is a parallel analysis in obscenity cases, see 50-51, supra.)

But in Katz v. McAulay, 438 F.2d 1058 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972, the court held that a student could be disciplined for distributing leaflets soliciting funds for the "Chicago Seven" defendants; the court emphasized the solicitation nature of the activity and the need to protect students from undue pressure from fund raisers:

> If there is no regulation against it, literally dozens of organizations and causes may importune pupils to solicit on their behalf; and it is foreseeable that pressure groups within the student body are likely to use more than polite requests to get contributions even from those who are in disagreement with the particular cause or who are, in truth, too poor to afford a donation.

Id. at 1061. See also Cloak v. Cody, 326 F.Supp. 391 (M.D. N.C.) vacated for mootness, 449 F.2d 781 (4th Cir. 1971) (upholding school board rule barring sales of newspapers on school grounds and denying student plaintiff's request for damages and injunctive relief.

LITERATURE DISTRIBUTION:

ANONYMITY

In Talley v. California, 362 U.S. 60 (1960), the Supreme Court held invalid on its face an ordinance forbidding distribution of handbills not containing the name and address of the writer and/or distributor. The court reasoned, in part (362 U.S. at 64):

> Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.

The anonymity issue has arisen in three school distribution cases. Rowe v. Cambell Union High Sch. Dist., Civil No. 51060 (N.D. Cal., Nov. 10, 1970), (required identification of publisher conceded to be invalid); Jacobs v. Board of Sch. Comm'rs, 349 F.Supp. 605, 608, 612 (S.D. Ind. 1972), aff'd, 490 F.2d 601 (7th Cir. 1973), vacated as moot, 420 U.S.128 (1975)(requirement to include name of "every person or organization" participating in publication; invalid "as requiring prior censorship and restraint"); Matter of Schiener, 11 N.Y. Ed. Rept. 293, 294-295 (N.Y. Ed. Comm'r 1972)(requirement of listing names of authors, publishers, editors and contributing writers upheld as a requirement of "responsible journalism" without even a citation of Talley).

In a related case, a court has held that a rule may not bar materials unless written by students at the school where distribution is planned. O'Reilly v. San Francisco Unified Sch. Dist., Civil No. 51427 (N.D. Cal. Nov. 10, 1970) (Clearinghouse No. 4133).

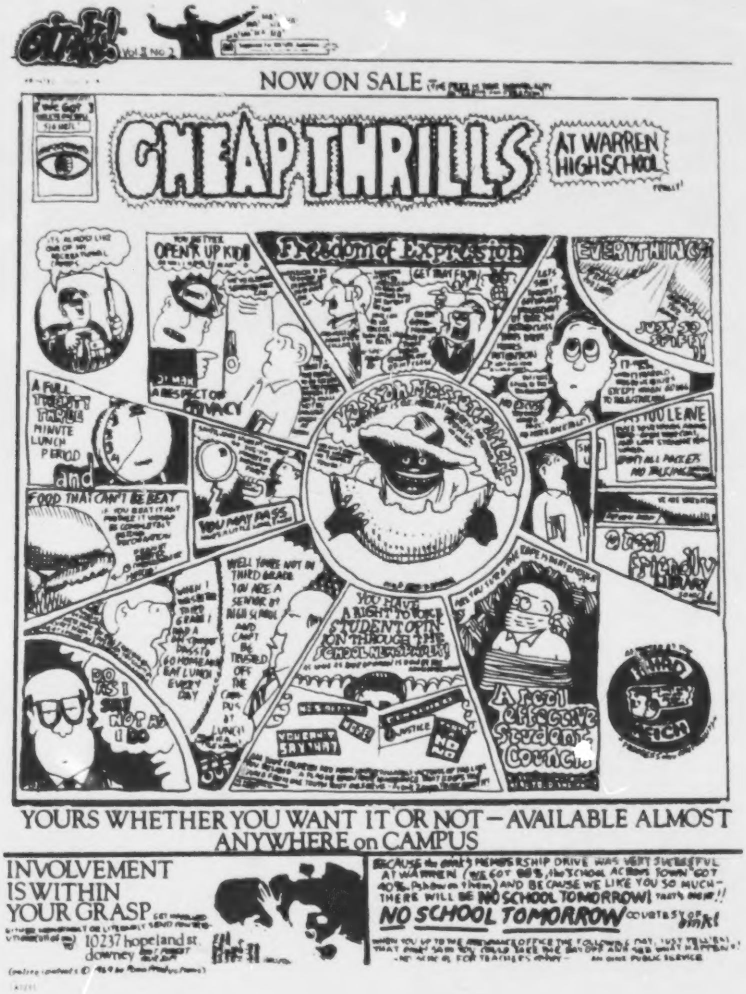
The Talley rationale for anonymity applies to students. Criticism of administrators by students is unlikely to be viewed by either side in the same way as clearly acceptable criticism, for example, by a citizen or an elected official. If anonymity is permitted, more student criticism can be expected.

Dissenting justices in Talley argued that the majority failed to distinguish situations where identification requirements had been upheld (newspapers must publish names of editor and others; lobbyists must disclose identity and other information) or were common (anonymous literature on political candidates forbidden, e.g., 18 U.S.C. 612). See 362 U.S. at 70. After Talley, courts have reached different conclusions on laws forbidding anonymous campaign literature. Compare United States v. Scott, 195 F.Supp. 440 (D.N.D. 1961) (18 U.S.C. 612 upheld) and Zwickler v. Koota, 290 F.Supp. 244 (E.D.N.Y. 1968) (New York law invalidated) (dismissal of complaint directed for failure to establish basis for declaratory relief) 394 U.S. 103 (1969).

In sum, while Talley provides strong support for an argument, its precise scope is unclear. The majority opinion in Talley stated that the ordinance was not narrowly limited to deal with the asserted policy goals of the legislators, i.e., "to identify those responsible for fraud, false advertising and libel." 362 U.S. at 64. It may be, therefore, that if anonymous literature creates some specific problem in a school, a rule narrowly drawn to address that problem will be upheld. On the other hand, if a rule against anonymity appears to be motivated merely by school officials' desire to learn the identity of their severest critics, it should be rejected.

These issues were dealt with by the seventh circuit in Jacobs, 490 F.2d 601 at 607:

Anonymous student publications perform similarly within the school community; without anonymity, fear of reprisal may deter peaceful discussion of controversial but important school rules and policies. Although the rule leaves students free to distribute anonymous literature beyond the school house gate, the question here, as in Tinker, is whether the state has demonstrated a sufficient justification of this prohibition within the school community, where students and teachers spend a significant portion of their time. . . . Defendants contend that the names of persons who have "participated in the publication" of literature must be provided so that those responsible for the publication of libelous or obscene articles can be held accountable. However, here as in Talley, the requirement is not limited to material as to which such justification might be urged. Indeed, if the regulation be read literally . . . [it] applies only to literature the content of which is acceptable. School authorities could not reasonably forecast that the distribution of any type of anonymous literature within the schools would substantially disrupt or materially interfere with school activities or discipline.


oink!
Vol II No 2

NOW ON SALE

CHEAP THRILLS
AT WARREN HIGHSCHOOL
OPEN UP KID!
A RESPECT OF PRIVACY
Freedom of Expression
EVERYTHING
JUST SO SPIFFY
A FULL TWENTY THREE MINUTE LUNCH PERIOD
and
FOOD THAT CAN'T BE BEAT
YOU MAY PASS
WELL YOU'RE NOT IN THIRD GRADE YOU ARE A SENIOR IN HIGH SCHOOL AND CAN'T BE TRUSTED OFF THE CAMPUS AT LUNCH
DO AS I SAY NOT AS I DO
YOU HAVE A RIGHT TO VOICE STUDENT OPINION THROUGH THE SCHOOL NEWSPAPER!
YOU CAN'T SAY THAT
NOPE!
JUSTICE
NO NO
A real effective Student Council
a real friendly LIBRARY
HAD
RICH

YOURS WHETHER YOU WANT IT OR NOT—AVAILABLE ALMOST ANYWHERE on CAMPUS

INVOLVEMENT IS WITHIN YOUR GRASP

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BECAUSE the oink's MEMBERSHIP DRIVE WAS VERY SUCCESSFUL AT WARREN (WE GOT 88%, the school across town got 40%. Pshaw on them) AND BECAUSE WE LIKE YOU SO MUCH— THERE WILL BE NO SCHOOL TOMORROW! that's right!!

NO SCHOOL TOMORROW courtesy of oink!

PRIOR REVIEW

Sometimes school officials seek to review literature or speeches or other forms of expression before it has been expressed. The only legal justification for such systems of prior review in a school context would be to screen out that which does not even qualify as speech. Prior review is clearly inappropriate as a system of preventing unprotected conduct which may accompany free expression. This conduct should be regulated by reasonable rules of time, place and manner, and review of the content of the expression is unnecessary to control of the conduct. Thus, prior review should only be an issue in cases of unprotected utterances--obscenity, defamation and the like. It should be no surprise that prior review of content is never viewed favorably by the courts, and the governmental body attempting to require it carries a heavy burden of proof to show it necessary and appropriate. As the Supreme Court recently observed:

> Any prior restraint on expression comes to this court with a "heavy presumption" against its constitutional validity. Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 181 . . . (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 . . . (1963). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint.

Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). In New York Times Co. v. United States, 403 U.S. 713 (1971), the Pentagon Papers case, a majority agreed that the government failed to meet its burden of justifying prior restraint, even in the face of arguments based upon national security. Id. at 714. In Healy v. James, 408 U.S. 169, 184 (1972), the court stated that the traditional "heavy burden" standard applies to prior restraint on the college campus.

Where prior review is to take place, it is also necessary to follow careful procedural safeguards. These were set out in Freedman v. Maryland, 380 U.S. 51 (1965). Appellant was convicted of exhibiting a motion picture without submitting it to the Maryland State Board of Censors for prior approval as required by state statute. The Supreme Court reversed the conviction, finding such a requirement would be constitutional only if subject to the following safeguards, id. at 58-59:

> First, the burden of proving that the film is unprotected expression must rest on the censor. . . . Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. See Bantam Books, Inc. v. Sullivan, supra. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

> Without these safeguards, it may prove too burdensome to seek review of the censor's determination.

Of course, in addition to these procedural safeguards, the regulations setting up the system of prior restraints must also be narrowly and specifically drawn to permit final restraints only on that which is beyond the protection of the constitution. See pp. 44-47, *supra*, and pp. 63-65, *infra*.

Some courts have ruled prior review requirements invalid without any further discussion. The Court of Appeals for the Seventh Circuit in *Fujishima v. Board of Educ.*, 460 F.2d at 1357, invalidated a prior approval rule of the Chicago school system "as a prior restraint in violation of the first amendment." See also *Jacobs v. Board of Sch. Comm'rs*, *aff'd*, 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975) (following *Fujishima*). In *Riseman v. School Comm. of Quincy*, 439 F.2d 148, 149 n. 2 (1st Cir. 1971), the first circuit set forth a general rule governing tribution. It provides in part:

> [N]o advance approval shall be required of the content of any such paper. However, the principal may require that no paper be distributed unless, at the time that the distribution commences, a copy thereof, with notice of where it is being and/or is to be distributed, be furnished him, in hand, if possible.

The final order in *Vail v. Board of Educ. of Portsmouth Sch. Dist.*, Civil No. 72-178 (D.N.H. Apr. 18, 1974) (set forth in full below) also stipulated that there would be no prior review of any material, and a copy should be given to the school principal. Pp. 75, 77, *infra*.

The district court in *Sullivan v. Houston Ind. Sch. Dist.*, 333 F.Supp. 1149 (S.D. Tex. 1971) (*Sullivan II*) also flatly rejected prior review, but it is no longer of precedential value. *Supplemental injunctions vacated*, 475 F.2d at 1076, 1078 (5th Cir. 1973).

Other appellate courts have stopped short of invalidating prior restraint on this *per se* basis, and have stated that it would be permissible under certain circumstances. In every case, however, the necessary circumstances were absent, and the courts have invalidated the particular schemes of prior restraint which were brought before it. See *Nitzberg v. Parks*, Civil No. 74-1839 (4th Cir., April 14, 1975); *Baughman v. Freienmuth*, 478 F.2d 1345, 1348 (4th Cir. 1973); *Shanley v. Northeast Ind. Sch. Dist.*, 462 F.2d 960, 969 (5th Cir. 1972); *Quarterman v. Byrd*, 453 F.2d 54, 57-59 (4th Cir. 1971); *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 805-808 (2d Cir. 1971). (District court orders and *dictum* in an opinion of a three judge court in another circuit are to the same effect.) *De Anza High School Students v. Richmond Unified Sch. Dist.*, Civil No. C-70-1074 (N.D. Cal. June 4, 1970) (preliminary injunction); *Mt. Eden High School Students v. Hayward Unified Sch. Dist.*, Civil No. C-70-1173 (N.D. Cal. June 4, 1970) (temporary restraining order); *Rowe v. Campbell Union High Sch. Dist.*, Civil No. 51060 (N.D. Cal. Nov. 10, 1970) (Clearinghouse No. 17,256) (*dictum*).

While these courts have said they would permit a properly devised system of prior review, statements about what they would permit are properly classified as *dicta* because none of them accepted the system that was before it. All of them carefully followed *Freedman v. Maryland*, discussed above.

For example, in *Nitzberg v. Parks*, school officials ordered two private student newspapers to cease publication, applying a board regulation limiting distribution of literature in schools. After students brought suit, the school board reconsidered its rule and revised it but litigation continued over the revised version. On the fourth revision, the district court approved the board's regulation and dissolved its injunction. The revised rule provided that literature could be distributed and posted in designated areas "as long as it is not obscene or libelous . . . and . . . does not reasonably lead the principal to forecast substantial disruption of or material interference with school activities." The rule required material to be submitted in advance for approval, and required the principal to give or deny approval within two "pupil days." A denial was to be in writing and could be appealed to an area assistant superintendent who was to decide within three "pupil days." Students and parents appealed. The appellate court cited Quarterman v. Byrd, a 1971 fourth circuit case which said, 453 F.2d at 58-59:

> Specifically, school authorities may by appropriate regulation exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can "reasonably 'forecast substantial disruption of or material interference with school activities'" on account of the distribution of such printed materials.

The court also relied on its 1973 decision in Baughman v. Freienmuth, 478 F.2d at 1346, where it recognized prior restraint if pursuant to "narrow, objective, and reasonable standards," including well-publicized precise criteria which included a definition of distribution, prompt action and an adequate appeals procedure. In Nitzberg, as in the preceeding cases, the court decided that the challenged regulation did not meet these specifications. It noted that there was no guidance as to what would constitute "substantial disruption or material interference" and no criteria for predicting such results for administrators. The court additionally criticized the rule for failing to define "pupil days," and for failing to stipulate that the student could appear before the principal to present his or her point of view.

The second circuit has also applied Freedman and found review procedures inadequate. In Eisner v. Stamford Bd. of Educ., 440 F.2d at 810-15, the court found the rule invalid for failure to specify the time in which review was to take place and to whom and how material should be submitted. 440 F.2d at 810-11. The fifth circuit has followed suit. Shanley v. Northeast Ind. Sch. Dist., with one judge disagreeing, found the existing policy defective because of the absence of a right of appeal from a principal's decision and to an expeditious appellate decision. 462 F.2d at 977-988. Finally, in In re Schiener, 11 N.Y. Ed. Rept. 293, 294 (N.Y. Ed. Comm'r 1972), New York's Commissioner of Education followed Eisner, approving prior review in principle but invalidating the challenged rule because of inadequate procedures and standards for review. Other grounds invoked have been: (1) vagueness because of the failure to define "distribution" -- Baughman, 478 F.2d at 1349; Shanley, 462 F.2d at 977; (2) absence of standards for evaluating materials (Quarterman, 453 F.2d at 1349; Shanley, 462 F.2d at 976-77); (3) absence of a provision applicable in a situation where a principal fails to act (Baughman, 478 F.2d at 1348); (4) overbreadth in applying to distribution unrelated in time or place to orderly conduct of school activities (Shanley, 462 F.2d at 976); and (5) "terms of art such as 'libelous' and 'obscene' are not sufficiently precise and understandable by high school students and administrators untutored in the law to be acceptable criteria." Baughman, 478 F.2d at 1350.

Although it indicated it would tolerate a system of prior review of large-scale distributions on school premises, the second circuit also observed that:

> A public school is undoubtedly a "marketplace of ideas." Early involvement in social comment and debate is a good method for future generations of adults to learn intelligent involvement.

Eisner v. Stamford Bd. of Educ., 440 F.2d at 807.

See also Snyder v. Board of Trustees of Univ. of Ill., 286 F.Supp. 927, 935-36, (N.D. Ill. 1968) (three-judge court). The court said, id.:

> Even assuming that prior restraint based solely on the content of the proposed speech is at all possible outside the special context of regulating obscenity in motion pictures . . . , the . . . Act fails to include the procedural safeguards now required for such a drastic form of regulation in an area touching upon our precious First Amendment freedoms.

The court cited Freedman v. Maryland and struck down a law prohibiting speakers on campus who represent "subversive, seditious, and un-American" organizations.

Because these courts said they would permit prior review under proper circumstances, some attention should be given to the conditions that they sought (and failed to find) as justification for the prior review system before them. The fifth circuit referred to "the necessity for discipline and orderly processes in the high schools . . . ." Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960, 969 (5th Cir. 1972). The second and fourth circuit cited Tinker's reasonable forecast language ("[The record does not demonstrate any facts which might] reasonably have led school authorities to forecast substantial disruption of or material interference with school activities. . . .") Eisner v. Stamford Board of Educ., 440 F.2d 803, 807 (2nd Cir. 1971); Quarterman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971).

However, the language in non-school cases would suggest that the school system carries a heavy burden of justification. See Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); New York Times v. United States, 403 U.S. 713 (1971). Merely citing a general need for discipline hardly seems adequate or appropriate in the light of these cases.

Second, the reasonable forecast language in Tinker represents an adaptation of the traditional "clear and present danger" test. See pp. 55-59, supra. This test has not been applied as a test of prior review systems in non-school cases. Indeed, it could not be met, for prior review systems are ongoing and permanent, while actions to forestall a "clear and present danger" should endure only so long as the danger, and are therefore temporary. A system of prior restraints to ward off constant danger is as absurd as a system of prior restraints to ward off constant "substantial disruption" in the schools.

The seventh circuit stated in Fujishima in criticizing Eisner (460 F.2d at 1358):

> In proper context, Mr. Justice Fortas' use of the word "forecast" in Tinker means a prediction by school officials that existing conduct, such as the wearing of arm bands --if allowed to continue--will probably interfere with school discipline.

This accurately describes the use made of the standard in Tinker. See 393 U.S. at 514. The Tinker test was developed to be applied to school regulation of ongoing conduct. See also Note. "Prior Restraints in Public High Schools," 1973 YALE LAW REVIEW 1325, 1332-34. Eisner and Quarterman in effect use language in a case where prior review was not an issue and not discussed (Tinker) to support a review system and ignore a number of other cases explicitly establishing Supreme Court antipathy to prior restraint.

None of these cases relate the need for prior review to actual abuses by students in a particular school system, although Quarterman, which dealt with the facial validity of a regulation, refers to a publication as "inflammatory and potentially disruptive . . . ." 453 F.2d at 57. In Shanley, students had distributed materials only before and after school, near but outside school grounds, and the Court found that there was "absolutely no disruption of class" and that the underground paper was "probably one of the most vanilla-flavored ever to reach a federal court." 462 F.2d at 964. The Supreme Court's language in Healy v. James suggests that prior review should not be imposed solely on the basis of a general concern of discipline as suggested in Shanley. The Court referred to the college's interest in "preventing disruption," noted that this "may" justify prior restraint and stated that the college must satisfy a "heavy burden." 408 U.S. at 184. In short, the general interest in avoiding disruption was inadequate. Absence of prior review of content will not render officials powerless. Rules could define impermissible content and contain sanctions to be applied after distribution took place.

In conclusion, a system of prior review of content creates a great risk of improper suppression. (Generally, school officials--representing an entire community (and perhaps elected)--will have a narrower view of protected speech than some students.) Robust expression at the periphery of the zone of protection is not often favored. Shanley is illustrative. There, the "controversial" statements advocated a review of marijuana laws and offered information on birth control. A Presidential Commission had made the same recommendation on marijuana laws and many materials in the school's library dealt with birth control. The court described the system's concern as "odd." 462 F.2d at 972. Also, it characterized two of its legal points as "a constitutional fossil, exhumed" and involving remarkable reliance on the conditional verb "could." 462 F.2d at 967, 975. What would this system do even with a perfect rule? More significantly, how many students will not take the initial risk of submitting material or be unable to overturn an adverse decision because of unawareness of their rights or lack of resources?

THE SCHOOL-SPONSORED FORUM

ATTEMPTS TO CENSOR SCHOOL-SPONSORED PUBLICATIONS

Courts have not given officials any greater control over student expression where the media were school-sponsored or funded. College and high school students have successfully challenged such censorship attempts.

In a circuit court case, university officials took exception to a letter which contained a "four-letter" epithet describing the president of the university and suspended the students responsible. The fourth circuit affirmed a district court decision to reinstate the students and expunge their records. *Thonen v. Jenkins*, 491 F.2d 722 (4th Cir. 1973).

In *Trujillo v. Love*, 322 F.Supp. 1266 (D. Colo. 1971), the paid managing editor of a college-sponsored and funded paper was suspended after the faculty advisor, on grounds of ethics and potential libel, refused to approve editorials which criticized sarcastically the college president and a local judge. The court stated in part, *id.* at 1270:

> The state is not necessarily the unfettered master of all it creates. Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with protected speech and are not unjustified [sic] by an overriding state interest. Antonelli v. Hammond, 308 F.Supp. 1329 (D. Mass. 1970); Zucker v. Panitz, 299 F.Supp. 102 (S.D.N.Y. 1969); Dickey v. Alabama State Board of Education, 273 F.Supp.613 (M.D. Ala. 1967); Wirta v. Alameda-Contra Costa Transit District, 68 Cal.2d 51 . . . (1967). In the context of an educational institution, a prohibition on protected speech, to be valid, must be "necessary to avoid material and substantial interference with schoolwork or discipline." Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503, 511 . . . (1969).

The court found no evidence of disruption, or proof of libel, noting that any libel claim must satisfy federal constitutional standards. The court directed plaintiff's reinstatement with back pay. *Id.* at 1271.

Antonelli v. Hammond, 308 F.Supp. 1329 (D. Mass. 1970), cited in *Trujillo*, applied similar standards in declaring unconstitutional a procedure for prior review of material to be published in a college paper supported by revenue from a compulsory student activity fee. The court: (1) held that the review procedure did not comport with the standards of *Freedman v. Maryland*, 380 U.S. 51 (1965), and questioned whether any prior restraint of a weekly newspaper would be permissible (308 F.Supp. 1329, 1335-1336 and n. [illegible]); (2) found "no showing that the harm from obscenity in a college setting is so much greater than in the public forum that it outweighs the danger to free expression inherent in censorship without procedural safeguards," *id.* at 1336, and (3) concluded that "the creation of the form [of expression] does not give birth also to the power to mold its substance." *Id.* at 1337. See also *Dickey v. Alabama Bd. of Educ.*, 273 F.Supp. 613 (M.D. Ala. 1967), *vacated as moot sub nom. Troy State Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968) (student editor suspended for disregarding instruction on content of weekly college paper; reinstatement ordered, in part, because official action was unrelated to maintenance of order and discipline.)

In *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973), *modified and aff'd en banc*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974), the university attempted to argue that it was the same as a private publisher and could edit out any material it wished. The court first rejected this claim because the magazine's ties to the English department were deemed tenuous, and because, although the university agreed to underwrite losses out of current funds, this was not expected to be a major financial contribution. The magazine was virtually self-supporting through sales and a grant from the Associated Student Body. 476 F.2d at 574. The court went on in dictum to determine that a university could never be a private publisher with arbitrary editorial powers, *id*. at 574:

> The University here is clearly an arm of the state and this single fact will always distinguish it from the purely private publisher as far as censorship rights are concerned. It seems a well-established rule that once a university recognizes a student activity which has elements of free expression, it can act to censor that expression only it if acts consistent with First Amendment constitutional guarantees.

On rehearing, the fifth circuit affirmed the decision *en banc* and modified it only to make it clear that the university could require the students to insert a disclaimer in each issue.

In *Korn v. Elkins*, 317 F.Supp. 138 (D. Md. 1970), University of Maryland officials refused to permit publication of a burning American flag on the cover of a "student feature magazine." The Maryland Attorney General had informed them that publication would violate the state's flag desecration law. The court majority held that the law had been unconstitutionally applied, principally because of the absence of evidence that suppression was "necessary to preserve order and discipline . . . ." *Id*. at 142.

Students have prevailed even where other students have forwarded religious objections to the expression, and even where the article in question was, to the reviewing court, "shockingly vile and offensive." *Panarella v. Birenbaum*, 32 N.Y. 2d 108, 343 N.Y.S.2d 333, 336 (1973). The New York Court of Appeals rejected the claim that the publication in two college-funded student newspapers of articles harshly critical of certain religious views violated the First Amendment's establishment of religion clause. Each school's paper printed one article; one paper also printed letters critical of the article. The court noted the absence of evidence of religious purpose, the secular objectives advanced by the papers, the absence of repeated attacks and the absence of a policy of excluding contrary views. The court also rejected the argument of a dissenting judge below that one article was "in such poor taste and so offensive to those who profess to be Christians" that the Board could adopt regulations to prevent a recurrence "in the name of enforcing decorum on campus and maintaining an efficient school system . . . ." 37 A.D. 2d 987, 990, 327 N.Y.S.2d 755, 760 (1971). The court of appeals affirmed and held that suppression could only be justified if "necessary to avoid material and substantial interference with the requirements of order and discipline. . . ." 32 N.Y.2d at 118.

Censorship efforts also failed in two high school cases. In *Koppell v. Levine*, 347 F.Supp. 456 (E.D.N.Y. 1972), a principal impounded copies of a high school-affiliated literary magazine as obscene. A story used "four-letter words" and referred to "a movie scene where a couple 'fell into bed.'" The court found the content of the magazine to be protected by free speech guarantees in part because it contained "no extended narrative . . . constituting a predominant appeal to prurient interest" and because it was not "patently offensive . . . as evidenced by comparable material appearing in respectable national periodicals and literature contained in the high school library." In addition, the court held that the review procedure did not comport with the standards of *Freedman*. The court's order allowed non-disruptive distribution on school property and permitted officials to stamp each copy to disclaim responsibility for content. *Id.* at 460.

In *Wesolek v. Board of Trustees*, Civil No. 73-5-101 (N.D. Ind. May 25, 1973) (Clearinghouse No. 10,376B) (temporary restraining order), the faculty advisor and school authorities refused to permit a high school newspaper to publish an article on birth control prepared by its editor. Their action was allegedly based on the article's controversial topic. Finding irreparable injury because of the plaintiff's impending graduation and imminent publication of the year's last issue of the paper, the court entered a temporary restraining order requiring publication of the article. The order states, in part: "Defendants have not claimed that the article is libelous, obscene or would create a material and substantial disruption of school activities."

University and school efforts to censor their papers on grounds that material is defamatory should be closely scrutinized. The law allows wide latitude in criticizing public officials (see pp.52-55, *supra*) and more often than not, the so-called justification is not based upon an accurate analysis of the school's risks. For a more objective discussion of schools' potential liability, see Note, *Tort Liability of a University for Libelous Material in Student Publications*, 71 MICH. L. REV. 1061 (1973) and p.54, *supra*.

Finally, it should be noted that *Trujillo* and *Koppell* suggest that there may be circumstances in which greater supervision of content would be permissible. *Trujillo* refers to a paper established and placed under the control of a journalism department as an instructional tool, and *Koppell* to "publications bearing the school's name, or on which school funds were about to be expended or materials or facilities employed . . . ." See 322 F.Supp. 1266, 1270, 347 F.Supp. at 460.

Of course, the school publisher has wide discretion to alter funding of a subsidized newspaper or periodical. But such changes, particularly reductions in funding must not be either in reprisal or as a means of limiting free expression. Thus, in *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973) the court found invalid a university fund cut-off to a campus newspaper which had advocated racial segregation. The court observed that funding should not be manipulated to support censorship of the editorial policy of the paper. The court felt that the editor should be able to express hostility to racial integration, unless such a policy would incite harrassment, violence or interfere with students or faculty in their normal functions. The court pointed out that the school could and should insist on free access to the paper for contrary points of view, and could and should prevent discrimination in staffing and advertising. *Id.* at 463.

ACCESS TO SCHOOL-SPONSORED MEDIA

In two cases, courts have ordered that school papers accept for publication editorial advertisements submitted by students. See *Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969); *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971).

In *Zucker*, a principal refused to allow publication of a paid advertisement opposing the Vietnam War. The paper had accepted "purely commercial advertising," and published news articles on "controversial topics," including the war. The court rejected--in effect, as an inadequate distinction--defendants' contention that their action was proper "since no advertising on political matters is permitted . . . ." 299 F.Supp. at 104. A claim that students had no right of access was also unavailing since "the paper appears to have been open to free expression of ideas in the news and editorial columns as well as in letters to the editor." *Id.* at 105.

A college newspaper board refused in *Lee* to accept three advertisements which supported a university employees' union and opposed racial discrimination and the Vietnam War. The board viewed the advertisements as outside the scope of its policy which allowed material on a commercial product, a commercial service, a meeting, a political candidate or a public service. The court held the board's action inconsistent with:

> . . . the proposition that a state public body which disseminates paid advertising of a commercial type may not reject other paid advertising on the basis that it is editorial in character.

441 F.2d 1257, 1259.

The court rejected the contention that the policy constituted a "reasonable means" of avoiding embarrassment and difficult judgment on material which "may be" obscene, libelous or subversive. This the court viewed as the "undifferentiated fear" rejected in *Tinker*.

The reasoning in *Zucker* and *Lee* generally follows that of subsequent cases holding that free speech and equal protection guarantees require that "justifications for selective exclusions from a public forum must be carefully scrutinized" and such exclusions be tailored to serve a substantial governmental interest." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972)(invalidating ordinance prohibiting all picketing within 150 feet of a school except for peaceful labor picketing); *People Acting Through Community Effort v. Doorley*, 468 F.2d 1143 (1st Cir. 1972) (invalidating ordinance prohibiting residential picketing except in certain labor disputes); *Bonner-Lyons v. School Comm.*, 480 F.2d 442 (1st Cir. 1973)(finding impermissible discrimination by school committee in access of citizens' group to internal system for disseminating notices). The *Bonner-Lyons* opinion reads, in part:

> . . . it is well sttled that once a forum is opened for the expression of views, regardless of how unusual the forum, under the dual mandate of the first amendment and the equal protection clause neither the government nor any private censor may pick and choose between those views which may or may not be expressed. *See, e.g.*, Police Department of Chicago v. Mosley, 408 U.S. 92 . . . (1972); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973)(en banc); Women Strike for Peace v. Morton, 472 F.2d 1973 (D.C. Cir. 1972); People Acting Through Community Effort v. Doorley, 468 F.2d 1143 (1st Cir. 1972); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972).

Id. at 444. It should be noted that in one of the cases cited, *National Socialist White People's Party v. Ringers*, the defendant was a school board which had consistently refused use of a school auditorium to the plaintiff. 473 F.2d 1010 (4th Cir. 1973).

The access principle seems applicable to more than publications, once a forum, however unusual, has been opened. Additional examples include the inviting of outside speakers, and the use of school equipment and paper. Speaker cases include *Duke v. Texas*, 327 F.Supp. 1218 (E.D. Tex.), *rev'd on other grounds*, 477 F.2d 244 (5th Cir. 1971), *cert. denied*, 415 U.S. 978 (1973) and *Dunkel v. Elkins*, 325 F.Supp. 1235 (D. Md. 1971). In *Duke* a federal court voided a state court injunction, issued at the request of a university, barring outsiders from campus. It was reversed under the abstention rule, and not because of the substantive first amendment rights enunciated by the court. In *Dunkel* the court ruled that the university could bar outsiders seeking a forum on campus only in emergency situations. A three-judge district court voided a Maryland law permitting university presidents to exclude outsiders from campus if they "have no lawful business" there or are "disruptive or disturbing to the normal educational functions of the institution." *Id.* at 1241.

This is not to say that the courts will order access to a school-controlled media in every situation. Where the school applies a consistent rule to all those seeking to gain access, ruling out only certain material without inserting any ideological bias, and there is strong justification for doing so, the case for access becomes harder. For example, in *Close v. Lederle*, 424 F.2d 988 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970), a university art instructor sought a court order restraining the university from removing his paintings from the student union. The work graphically portrayed sexual organs of nude males and females and bore "cheap titles" ("'I'm only 12 and already my mother's lover wants me.'") The court observed that the corridor in question was a public passageway and used by children, and dismissed the complaint:

> Where there was, in effect, a captive audience, defendants had a right to afford protection against "assault upon individual privacy . . . ."

For cases involving a teacher's right to use the classroom as a forum for the expression of views, see p. 29, *supra*.

CONCLUSION

Tinker rejected an absolute approach. The Court stated that students do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate," but also affirmed "the comprehensive authority" of school officials "to prescribe and control conduct in the schools." (393 U.S. 503, 506, 507.) First amendment rights were to be available "applied in light of the special characteristics of the school environment . . . ." 393 U.S. 503, 506. Implicitly at least, this language suggested that in view of the compulsory attendance laws, the purposes of education and the nature of school facilities, school grounds and buildings were not the same as a park, for example, with respect to the exercise of first amendment rights. See Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960, 968-969. The distribution and other cases discussed in this note, most decided since the Tinker decision, provide a basis for framing some conclusions on the impact on traditional free speech principles of schools' "special characteristics."

First, there has not been a strong tendency to dilute the body of free expression law. The principal exception is the majority dicta permitting prior review of content (Eisner, Quarterman and Shanley); however, two circuits would not allow prior restraint (Riseman, Fujishima). Baker upheld sanctions for material not ruled legally obscene. This is a minority view. Compare with Vail, Sullivan, Fujishima, Jacobs, Papish. Schwartz and Graham seem to exclude challenges to the facial validity of a policy, but many more cases allow such attacks. E.g., Quarterman, Eisner, Fujishima, Baughman, Vail.

Ready opportunities for diluting principles have not been accepted. For example, in Papish, the majority applied the technical definition of obscenity, and held, in part, that materials were not obscene. Chief Justice Burger dissented, and argued in support of upholding the expulsion:

> In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms.

This view has not prevailed. Materials critical of school personnel have generally not been barred on the ground that they would necessarily undermine administrators' ability to control schools. Contra, Norton, 419 F.2d 195, 198. Censorship of school-sponsored and funded publications has not been permitted.

There are two additional indicia of the extent to which free expression principles have been applied with full force. In Healy v. James, the case on a college's non-recognition of an SDS chapter, Justice Rehnquist concurred in the judgment in a separate and individual opinion. He argued that "[p]rior cases dealing with first amendment rights are not fungible goods," that "school administrator[s] may impose upon . . . students reasonable regulations that would be impermissible if imposed by the government for all citizens" and that "some of the language used by the Court tends to obscure [this distinction] . . . ." 408 U.S. at 203. In Shanley the court expressly stated that speech in the school context could be subjected to greater than normal restriction, and upheld prior review in principle. 462 F.2d at 969. However, the remainder of the decision forcefully applies a number of traditional standards.

Second, given the refusal of the majority of courts to expand the limited areas in which officials may forbid or punish expression irrespective of impact (e.g., obscenity), the Tinker disruption-disorder standard allows considerable latitude for expression. There are few distribution cases in which officials have even attempted to establish actual disruption. See Sullivan, Baker, Norton. There would appear, therefore, to be considerable opportunities for distribution without "material" disruption, "substantial" disorder or "invasion" of others' rights. For example, in the Vail case, evidence adduced in support of a challenge to a revised distribution rule indicated that students had a free period each day during which they had been allowed to gather and converse in a number of areas. Distribution in free periods and before and after school would create a broad opportunity for expression, without apparent disruption.

Third, students constitute a large part of our population and they spend much time in schools. Any dilution of free speech guarantees has, therefore, a very substantial impact. Furthermore, school is likely to be the first contact which students have with persons subject to the free expression requirements. Less than "scrupulous protection of Constitutional freedoms" may well "strangle the free mind at its source and teach youth to discourt important principles of our government as mere platitudes." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). See also Shanley, 462 F.2d 960, 972-973.

Robert Pressman and
P.M. Lines
Center for Law and Education
July 15, 1975

(This note appeared originally as
Pressman, Students' Right to Write
and Distribute, 15 INEQUALITY IN
EDUCATION 63 (Nov. 1973) and was
expanded and updated by Lines, June-
July, 1975.)

Appendix to Part III(A)(2)

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

CALVAN VAIL, EVON MAYO, et al.,)
Plaintiffs,)
)
v.) Civil Action No. 72-178
)
THE BOARD OF EDUCATION OF)
THE PORTSMOUTH SCHOOL)
DISTRICT, et al.,)
Defendants.)

ORDER

The parties by their counsel have agreed to a basis for resolving the pending issues in this case. The Court hereby approves and adopts the provisions consented to by counsel for the parties as follows:

1. The rules for distributing written materials and for inviting speakers shall be as set forth in attachments A and B.

2. Upon receiving the Court's order approving the rules, the system shall announce to high school students (a) that rules on distributing literature and inviting speakers have been approved by the Court and (b) the place or places where interested students may read copies of the rules. Thereafter, the text of the rules shall appear in the annual editions of the student handbook.

3. The system shall have the right to establish a grievance committee which could rule on any substantive matters relating to the rules in the event that disagreement arises as to their application. This committee shall function in accordance with the First and Fourteenth Amendments to the United States Constitution. This committee would consist of thirteen (13) people: the school principal; four (4) members of the high school executive board; and eight (8) students. For 1973-74, the students would be elected at large from the student body, but beginning in 1974-75, the president and vice-president of each class (grades 9-12) would assume the responsibility of providing the students' voice on this committee.

Consented To:

George C. Bruno
New Hampshire Legal
Assistance - for Plaintiffs

Hugh H. Bownes
Hon. Hugh Bownes
U.S. District Judge

Robert Pressman
Robert Pressman
Center for Law and
Education - for Plaintiffs

April 18, 1974

Distribution of Written Materials

The purpose of this rule is to explain the right of students to distribute written materials on the school grounds and within Portsmouth High School.

1. What a student may distribute. A student may distribute leaflets, brochures, non-school sponsored papers, school-sponsored papers or other written materials. There is no requirement that a student has written the material which he or she distributes.

2. When a student may distribute. A student may distribute written material before and after his or her school day and during any free period. A student may not distribute written material when he or she has a regular class period, a study period or other regular school duties. A student may not distribute materials to students engaged in regular school duties or who he knows are supposed to be engaged in regular school duties.

3. Where a student may distribute. A student may distribute written material in one or more of the following places:

- outside the school on the school grounds,
- in the various resource centers,
- in the foyer area.

Any student or students distributing printed materials in accordance with these procedures shall bear the responsibility to see that the immediate area or areas in which said distribution is made be cleared of all materials which may have been discarded by the recipients of same onto the floor or the area of distribution. If the distributor wishes to place a trash receptacle in the area, he may make a request to the janitorial staff in order to obtain suitable receptacles.

Attachment A

4. How a student may distribute. A student should distribute literature in an orderly manner, attempting to minimize noise. A student should not force another person to accept literature. A student distributing material should be careful not to block entrances and exits. A student may sell material, or distribute it free.

5. No prior review of content. There will be no prior review of the content of any written material to which this rule applies. A copy of the material shall be provided to the school principal so that he will have an opportunity to familiarize himself with the nature and substance of what is being distributed.

6. Liability Disclaimer. The Portsmouth School System, its employees and all authorized representatives shall not, in any circumstances, be held liable for any action arising from the dissemination of information within the Portsmouth School System resulting from these rules and regulations. This liability limitation shall extend to all information disseminated under these rules unless it originates from the Portsmouth School System, its employees or one of its authorized representatives.

Inviting of Speakers

The purpose of this rule is to explain the right of a student to have a person speak in the Portsmouth High School on a topic to the student's or speaker's choice. The rule describes three separate methods for inviting speakers. A student may proceed under the method of his choice. He need not proceed initially by any particular method.

1. A student(s) may request of the building principal at least 24 hours in advance that he provide available space for a talk by a speaker of the student's choice. Available space shall be provided, upon request, for 4 or more speakers each month in which school is in session. Talks may be scheduled during the school day for students not having assigned school duties at the time the talk is held. "School day" includes the total day for grades 9 to 12. Available space refers to a vacant classroom, room 108 or the auditorium when not in use, etc. When a student requests use of a room other than a vacant regular classroom or room 108, the principal may request the student to make a showing, by providing a list of signatures or otherwise, that anticipated attendance is large enough to warrant use of a room other than a vacant regular classroom or room 108. In the event that requests are made for more than 4 speakers in a month, and the principal decides not to allow more than 4 talks, preference shall be given based upon the chronological order of requests. A student whose request is denied when this procedure is employed shall have preference in the next month for which the allotment has not been exceeded.

2. A student(s) may request a teacher or teachers to provide an opportunity for a speaker of the student's choice to address a class or combined classes. The teacher or teachers may grant the student's request. The teacher or teachers may open the talk to

Attachment B

students from outside the regular class or classes who do not have assigned school duties during the period in which the talk is held. The teacher or teachers shall have the right to use available space to accommodate the anticipated audience (e.g., room 108, the auditorium, etc.)

3. If the school has a program of assemblies for students, it shall notify students that 2 or more assemblies each school year may be composed of speakers chosen by students. Students may make requests for speakers to the principal. In the event that requests are made which would require more than two assemblies, and the principal decides not to allow more than 2 assemblies, preference shall be given based upon the chronological order of requests.

4. This rule does not limit the right of teachers, school administrators or the school board to provide for speaking opportunities in addition to those described in paragraphs (1), (2), and (3).

5. Students should proceed to rooms in which talks are to be given and conduct themselves once there in an orderly manner, attempting to minimize noise. No one should be forced to attend a talk. An admission charge may be required by students to defray the cost of providing a speaker.

6. Notwithstanding the foregoing paragraphs, policies and practices on inviting speakers shall not have the effect of discriminating against any person or point of view. Thus, for example, if a teacher has initially invited to a class a speaker who takes a particular viewpoint, the teacher shall not have the discretion designated in paragraph (2) to reject a speaker proposed by a student to present an opposing viewpoint.

7. The Portsmouth School System will not accept any responsibility for the causes of action arising from remarks made by any speaker or speakers invited to speak within the Portsmouth School System in accordance with these rules and regulations.

III(A)(3) From Simple Symbols to Sit-Ins and Walk-Outs

Some forms of expression are not primarily dependent upon the dissemination of words (as in the distribution of literature), but are conveyed primarily through symbols or symbolic action. In some cases, the message is conveyed through the unobtrusive display of a silent symbol. Thus, in Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503 (1969) students demonstrated disagreement with involvement in Viet Nam by wearing black armbands. Nothing more was said or done. The students were physically in their correct places at the correct times, and behaved with decorum. In West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) students expressed their religious views by refusal to salute the flag. Nothing else was said or done. In both these cases, the Supreme Court found no significant reason for limiting free speech within the schools. Sometimes a few words may be included in the symbol, as is the case with buttons and badges.

At the other extreme, students have expressed their views through large-scale demonstrations, sit-ins, and other similar activities. These demonstrations are often in conflict with school schedules and often involve the presence of students in places or at times where they may be disruptive.

This note will consider the full range of cases which use symbolic actions as the primary vehicle of expression.

THE TEST

Traditionally, where state officials have attempted to control speech, the Court has required the state to show that there is a "clear and present danger" that a substantial evil is imminent. E.g., Bridges v. California, 314 U.S. 252, 260-61 (1941) (overruling conviction for contempt of court based on criticism of court actions during pending trial); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam opinion striking down Ohio's criminal syndicalism act). Where the message is conveyed primarily through wordless conduct, however, a different rule may apply. In United States v. O'Brien, 391 U.S. 367 (1968) the Court considered the test to be applied in a case regulating conduct which had symbolic meaning (burning of a draft card in violation of federal law). The Court found that the primary purpose of the regulation in question was valid, and was designed to facilitate the administration of the draft. The Court classified O'Brien's act as primarily conduct, and the symbolic elements as "incidental", id. at 376:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. . . . This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech elements can justify incidental limitations on First Amendment freedoms.

In these circumstances, the Court set forth the following standard for determining whether the governmental interest in regulating the nonspeech elements was sufficient to justify also regulating expression, id. at 377:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Thus, "clear and present danger" is required before the state can restrict "pure speech," whereas, in at least some circumstances, conduct with some symbolic meaning can be inhibited if the regulation forwards a constitutionally valid and substantial governmental interest and impinges incidentally on the expressive elements no more than necessary. This analysis is too simple, however, as the Court has held symbolic expression to be equivalent to "pure speech" in some cases, e.g., Tinker v. Des Moines Ind. Community Sch. Dist., 393 U.S. 503, 505, (1969):

> As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech".

Thus in Tinker, the Court adopted a variation of the "clear and present danger" test, requiring the school officials to show that they could reasonably forecast material and substantial disruption of school operations. Id. at 509, 512, 513, 514. As the following discussion of the cases shows, the courts have generally analyzed symbolic expression in the school context in the light of Tinker.

BUTTONS AND BADGES

The one form of symbolic conduct which should clearly be classified as "akin to pure speech" is the wearing of buttons or badges. In these cases the Tinker disruption standard must be applied. Tinker by no means immunizes students wearing symbols from disciplinary action, however. The Tinker court itself cited with approval two fifth circuit cases which produced opposite results for students who wore "freedom buttons." In one case the court found that disruptive conduct which accompanied wearing of the insignia justified a ban on them. "In this case the reprehensible conduct described . . . was so inexorably tied to the wearing of the buttons that the two are not separable." Blackwell v. Issaquena County Bd., 363 F.2d 749, 754 (5th Cir. 1966). The same court at the same time in Burnside v. Byers, 363 F.2d 744 (5th Cir. 1966), affirmed the right of students in another school to wear almost identical buttons, but distinguished that case as not involving any disruption by the students involved.

Some courts have held, following Tinker, that plain colored armbands are not themselves sufficiently disruptive to justify banning them from schools. Moreover, the fact that "isolated incidents of unrest or apprehension were attributable to the wearing of the brown armbands" is insufficient to justify forbidding them. *Aguirre v. Tahoka Ind. Sch. Dist.*, 311 F.Supp. 664, 666 (N.D. Tex. 1970). In another case some students wore black armbands while an opposing faction wore white. The school attempted to justify its restrictions based on a potential altercation and on an expectation that black armband wearers planned to initiate disruption. The court held that:

> What more was required at least was a determination, based on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right [to wear an armband] and that foregoing such exercise would tend to make the expected disruption substantially less probable or less severe.

The court enjoined school officials from interfering with students wearing the insignias. *Butts v. Dallas Ind. Sch. Dist.*, 436 F.2d 728, 731 (5th Cir. 1971). In *Hatter v. Los Angeles City High Sch. Dist.*, 452 F.2d 673 (9th Cir. 1971) the court extended *Tinker* to students wearing buttons opposed to the school's chocolate sales. The appellate court in *Hatter* observed that the protected speech did not have to be of "great national concern," and directed the trial court, which had dismissed the case, to hear it. See also *Yench v. Stockmar*, 483 F.2d 820, 824 (10th Cir. 1973)(remanded to determine if the wearing of a Mickey Mouse hat at graduation ceremonies was the exercise of a right of constitutional dimensions noting that the record was silent on this issue.) *Accord*, *James v. Board of Educ.*, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972) (court cannot dismiss teacher's case). On remand, the district court awarded back pay and reinstated the teacher, who had peacefully displayed a black armband. 385 F.Supp. 209 (W.D.N.Y. 1974).

There have been instances, however, when courts have upheld the right of schools to deny the use of armbands. For example, in *Hill v. Lewis*, 323 F.Supp. 55 (E.D.N.C. 1971), where some students wanted to wear armbands to protest the Viet Nam war, others wanted to wear armbands in support of the war. More than one-third of the students in the school were children of military personnel; there were group demonstrations and counter-demonstrations; there were actual disruptions and threats of violence, and at one point law enforcement officers had to be called. The ban on armbands applied equally to all factions within the school. In *Wise v. Sauers*, 345 F.Supp. 90 (E.D.Pa. 1972), *aff'd without opinion*, 481 F.2d 1400 (3rd Cir. 1973), the school allowed plain, single colored armbands, but not ones saying "strike," "rally," or "stop the killing." The court relied on the limited and temporary nature of the rule and the potentially disruptive situation in the school at the time.

In *Williams v. Eaton*, 468 F.2d 1079 (10th Cir. 1972), the court allowed a university to deny athletes the right to wear armbands on the playing field when the symbols were intended to convey hostility towards their opponents' religious beliefs. The court treated this as an alternative test to the *Tinker* disruption test, finding it based on a "mandate of complete neutrality" on religious matters. The appellate court accepted the trial court's finding of fact that the athlete's protest was not focused on the racial bias of their opponents, as they had contended.

As expressly recognized by the Court in *Tinker*, some types of symbols (*i.e.*, the Confederate flag or the swastika), convey long-established meanings which in normal circumstances will frequently evoke strong reactions and be classified as "fighting words." In one case, the district court ordered school officials and school personnel to refrain from wearing symbols of resistance to the court's desegregation order. The court recognized that the Confederate battle flag may be "a symbol of resistance to school integration and, to some, a symbol of white racism in general" and that "the display of that flag [by school officials] is an affront to every Negro student in the school . . . ." The court restricted its order to "symbols or indicia . . . *expressing the school board's or its employees'* desire to maintain segregated schools . . . ." Individual students were not denied the right to exhibit the same symbols. *Smith v. St. Tammany Parish Sch. Bd.*, 316 F.Supp. 1174, 1176-77 (E.D. La. 1970), *aff'd*, 448 F.2d 414 (5th Cir. 1971).

In another school desegregation case, the court found insufficient evidence of racial segregation and refused plaintiff's request that the court ban such emblems. The court held that students may use symbols that are unwise or unpopular or even offensive to a significant part of the student body so long as they were not disruptive. *Banks v. Muncie Community Schools*, 433 F.2d 292 (7th Cir. 1970). In *Banks* the court allowed the continued use of a Confederate-type flag and nicknames, despite protests by blacks, holding that courts may not interfere unless the emblems are directly related to the exercise of the constitutional right of free speech, are directly related to a violation of equal protection rights, or disruption is likely to occur. See also *Augustus v. Board of Public Instruction*, 507 F.2d 152 (5th Cir. 1975), *rev'ing*, 361 F.Supp 383 (N.D. Fla. 1973) (district court erred in not evaluating the school board's "regulation and enforcement mechanism to see if in fact they would eliminate the main objection to the symbols [word 'Rebels' and Confederate flag], their use as racial irritants";district court had given injunctive relief against use of symbols).

In one case a tense racial situation served as justification for a school ban on Confederate arm patches and the like, and the court ruled for the school officials. *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973); see also *Guzick v. Drebus*, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

Courts have held that some symbols can be banned because of the connection between the symbol and the disruptive behavior of their users. In *Hernandez v. School Dist. No. 1 of Denver*, 315 F.Supp. 289 (D.Colo. 1970), the court allowed the school to forbid the wearing of black berets because "the beret was used by plaintiffs as a symbol of their power to disrupt the conduct of the school and the exercise of control over the student body." *Id.* at 291. There was ample evidence that the same students were disruptive in other ways.

Finally, in these "akin to 'pure speech'" cases, the forecast of disruption does not justify an excessively repressive response by school officials, but only that which is necessary to maintain order. In *Karp v. Becken*, 477 F.2d 171 (9th Cir. 1973) the appellate court reversed a decision by the trial court in favor of school officials for lack of substantial evidence to support a reasonable forecast of disruption. *Id.* at 176. The student in question was suspended for five days for displaying signs and distributing them to other students; the signs protested the school's decision to let a particular teacher's contract expire. The court expressly found that the activity was "pure speech rather than conduct," *id.* at 176, and applied the *Tinker* standard. The appellate court observed that there was evidence of potential tension which would justify the removal of the signs by school officials, but that this potential was not enough to justify the suspensions. In this case the lower court had agreed with school officials that the suspension was based on the student's conduct relative to a planned walk-out, but the appellate court noted that the school was willing to reduce the punishment if the student would agree to leave his signs at home, and concluded that the punishment was really for the sign activity and not the walk-out.

DEMONSTRATIONS, SIT-INS, AND WALK-OUTS

THE DISRUPTION TEST

In cases of demonstrations and sit-ins, there is a greater likelihood of disruption because the activity frequently requires the student to be in the wrong place at the wrong time. This is not always true, however, and where time and place are appropriate, the court should recognize the absence of wrongful conduct (other than the isolated symbol itself) and treat the symbolic conduct like speech, and tolerate expression in this form unless it meets the Tinker standards of material disruption. Thus, in Grayned v. City of Rockford, 408 U.S. 104 (1972) the Supreme Court struck down a city anti-picketing ordinance which attempted to seal off the area around a school from protest demonstrations. However, after invalidating an anti-picketing ordinance, the court upheld an anti-noise ordinance, provided it was interpreted and applied within the guidelines established by Tinker. The court held that "a public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public," id. at 118, and that daytime picketing and handbilling on public grounds even near a school would be permissible if it were quiet, peaceful and did not disturb the normal functioning of the school. But the state's interests in promoting education are real, too, and "schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse." Id. at 119.

Grayned involved a public demonstration on public land outside but near a classroom. Other courts have used a similar rationale to allow students and other members of the academic community to demonstrate on school property "as long as it is not obstructive or disruptive," Saunders v. Virginia Polytechnic Inst., 417 F.2d 1127 (4th Cir. 1969), and to allow handbilling in areas on a state university campus generally open to the public at large, Jones v. Board of Regents, 436 F.2d 618 (9th Cir. 1970). In these kinds of cases, as was true in Tinker, the "possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right . . . to be present." Wright v. Georgia, 373 U.S. 284, 293 (1963).

Where students are in the wrong place at the wrong time, the courts have been fairly unanimous in upholding the right of schools to bar the activity and to discipline students taking part in it. Usually they apply the Tinker test. Evans v. State Bd. of Agriculture, 325 F.Supp 1353 (D. Colo 1971) is typical. The court upheld a ban on demonstrations and the display of signs at an athletic event, citing a tense situation as justification. There was evidence of disruptive conduct as well as speech, to the point where campus police had to be called to stop a fight. "The situation was tense, and panic or riot was more than a mere possibility." Id. at 1355. The demonstration, which included the display of signs, was plainly directed at alleged racist policies of the religious denomination governing the university which had sent the opposing team. The court applied the Tinker standard. Accord, Esteban v. Central Missouri State Col., 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970); Barker v. Hardway, 283 F.Supp. 228 (S.D.W.Va. 1968), aff'd per *curiam*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969) (pre-*Tinker* case, but court relied on evidence of disruption).

Courts also agree that demonstrations in which students physically deny access to school facilities, whether violent or not, are likewise unprotected by the constitution. These include "sit-ins" and building "take-overs" in any form. Cases of this type include *Buttny v. Smiley*, 281 F.Supp. 280, 286-87 (D. Colo. 1968):

> We hold that the First Amendment guarantee of freedom of speech . . . does not give . . . [plaintiffs] the right to prevent access to campus facilities. . . .
>
> . . . .
>
> . . . Similarly plaintiffs . . . had a right to be where they were at the time in question, but they did not have the right to exclude others from free movement in the area.

See also *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 762 (W.D. La. 1968):

> Counsel for plaintiffs have cited no authority, and we have found none, which stands for the proposition that activity which amounts to taking possession, physically and by force of numbers, of the College's property, thus effectively paralyzing operation of this public enterprise, is protected activity under the First Amendment.

Reminiscent of the Court in *O'Brien*, the Third Circuit in *Sill v. Pennsylvania State Univ.*, 467 F.2d 463, 468 (3d Cir. 1972) observed:

> [T]he mere fact that free speech is intermingled with the conduct for which appellants were punished does not bring it within constitutional protection.

See also, *e.g.*, *Blanton v. State Univ. of New York*, 489 F.2d 377 (2d Cir. 1973) (sleep-in at dormitory lounge); *Farrell v. Joel*, 437 F.2d 160 (2d Cir. 1971) (sit-in and absence from class); *Herman v. University of South Carolina*, 457 F.2d 902 (4th Cir. 1972) (sit-in); *Haynes v. Dallas County Jr. Col. Dist.*, 386 F.Supp. 208 (N.D. Tex. 1974) ("access to the college bookstore and to stairways to classrooms was impeded"); *Furumoto v. Lyman*, 362 F.Supp. 1267 (N.D. Cal. 1973) (classroom disruption); *Gebert v. Hoffman*, 336 F.Supp. 694 (E.D. Pa. 1972)(sit-in involving absence from class and forcing some classes to relocate); *Consejo General de Estudiantes v. University of Puerto Rico*, 325 F.Supp. 453 (D. P.R. 1971) (sit-in at dean's office); *Bistrick v. University of South Carolina*, 324 F.Supp. 942 (D. S.C. 1971) (sit-in and ousting of university officials); *Whitfield v. Simpson*, 312 F.Supp. 889 (E.D. Ill. 1970); *French v. Bashful*, 303 F.Supp. 1333 (E.D. La. 1969), *modified and aff'd per curiam*, 425 F.2d 182 (5th Cir. 1970) (dean's office sit-in); *Siegel v. Board of Regents*, 308 F.Supp. 832 (N.D. Cal. 1970) (exhorting others to commit illegal acts during demonstration); *Brown v. Greer*, 296 F.Supp. 595 (S.D. Miss. 1969) (violent demonstration); *Evers v. Birdsong*, 287 F.Supp. 900 (S.D. Miss. 1968) (same).

Courts also generally find that boycotts and walkouts are disruptive of the educational process and thus clearly within *Tinker's* criteria of material disruption. *Dunn v. Tyler Ind. Sch. Dist.*, 460 F.2d 137 (5th Cir. 1972). In *Dunn* the court ruled that "the school was authorized to act with regard to a mass refusal to attend classes." *Id.* at 142. See also *Black Students of North Fort Myers Jr.-Sr. High Sch. v. Williams*, 335 F.Supp. 820 (M.D. Fla. 1972), *aff'd per curiam*, 470 F.2d 957 (5th Cir. 1972); *Hobson v. Bailey*, 309 F.Supp. 1393 (W.D. Tenn. 1970). The court in *Dunn* also relied upon a tense atmosphere at the school. 460 F.2d at 145.

In Tate v. Board of Educ., 453 F.2d 975 (8th Cir. 1972), the court held that students could be disciplined for attending an optional pep rally and then walking out when "Dixie" was played; id. at 978.

> Inasmuch as the walkout took place during the fourth number on the program and involved twenty-nine students we cannot find that no disruption of school "order and decorum" occurred or that this conduct was a constitutionally protected form of dissent.

All of these decisions cited above applied the Tinker standard, except for pre-Tinker cases which applied a very similar "substantial disruption" test.

It should be noted that the school's authority over the school setting may extend to include a right to discipline students who are not directly disruptive but who fail to comply with reasonable school rules designed to restore order. There are two cases where the students were not clearly contributing to any "substantial disruption" of the school process but where the courts nonetheless upheld disciplinary proceedings. In both of the cases, the element of expression had become subordinate and incidental, and the student's conduct was the primary focus of the disciplinary proceeding. Cf., United States v. O'Brien, 391 U.S. 375 (1968) (discussed supra). In Herman v. Univ. of South Carolina, 457 F.2d 902 (1972) the court upheld an expulsion of a student peacefully participating in a sit-in where other students had engaged in misconduct (a lock out) and the expelled student had refused to obey an order to leave. In Bistrick v. University of South Carolina, 324 F.Supp. 942, 944 (D. S.C. 1971) the court noted the lack of evidence that plaintiff students had done anything to contribute to a lock-out of university officials, but upheld disciplinary action for failure to leave when ordered to in the context of the sit-in and lock-out there. These cases rest on very narrow fact situations, however, and they should not be extended to permit school disciplinary action against bystanders whose presense is entirely innocent, as will be discussed below.

LEADERS AND BYSTANDERS

Because of the numbers of persons taking part in large demonstrations, there is a real danger that non-disruptive students will be punished with the others. Of course, the evidence adduced at the disciplinary hearing must link the student to the disorderly demonstration, boycott or sit-in. Two types of innocent students are often on hand at a disorderly demonstration: 1) leaders and planners who were to discover that their plans went beyond their expectations; and 2) the curious or unaware student who happens upon the event and stays as an observer.

Planners

In Scoggin v. Lincoln Univ., 291 F.Supp. 161 (W.D. Mo. 1968), the court found a lack of substantial evidence tying the suspended students identified as "planners" of a demonstration, to disturbances. The only evidence against them tended to show that they planned a demonstration without any attempt to incite unlawful action by participants, and that there was disorder following the demonstration. However, the court in Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975) permitted Grambling College to discipline leaders of a mass demonstration, id. at 1001:

> The evidence clearly shows that, at least as to Jenkins, Scott and Acorn, these "leaders," "organizers," and "instigators" of the boycott did provoke group action which led to violence. They did so not only by the simple expedient of making speeches urging a boycott, but by actively going about the campus in an effort to gain support for the protest. They stimulated many members of the student body to an emotional state which erupted into the serious and destructive violence of the evening of November 2, 1972. The record in this case demonstrates that these three students, from time to time and in varying degrees, had a strong power and influence over the conduct of their fellow students. The mere use of the descriptive term "peaceful boycott" cannot, under the circumstances of this case, be used to immunize and shield what was actually done.
>
> The case against Pitre is not as strong as that against the other three organizers. Nevertheless, the record supports the Board's finding that he was a part of the group as an active participant in the series of meetings which led to the disruptions.

Bystanders

Innocent bystanders, of course, should not be disciplined. Evidence that a student was present at the scene of a demonstration, in the absence of evidence that he was present during actual disorder or during the announcement of an order to disperse was deemed inadequate to justify a suspension. Id. at 1001-02. Accord, Wong v. Hayakawa, 464 F.2d 1282 (9th Cir. 1972), cert. denied, 409 U.S. 1130 (1973), where the only evidence linking the disciplined students to a violent demonstration was the appearance of their names on a list of 454 persons arrested at the time.

PRIOR RESTRAINTS

The question of whether or not the school may require prior approval of demonstrations is somewhat analogous to the question of prior review of the distribution of literature. See Section III (A) (3), at 62-66, *supra*. Generally speaking, the prior approval requirement should be tied to legitimate school interests in policing traffic control, space allocation, noise control and similar matters unrelated to the content of the message to be conveyed at the demonstration. The prior approval scheme must also provide for a clear statement of permissible and impermissible time, place and manner standards. *E.g.*, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (striking down city ordinance which required parade licenses of defendants who were denied licenses and subsequently convicted); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (overturning convictions for holding unlicensed meeting in public park). In no case, moreover, should prior review be used to censor content of speech. In *Hammond v. South Carolina State Col.*, 272 F.Supp. 947 (D.S.C. 1967) the court struck down a college rule requiring prior approval for any demonstration on campus. The court said, *id*. at 950:

> I am persuaded that Rule 1 is on its face a prior restraint on the right to freedom of speech and the right to assemble. The rule does not purport to prohibit assemblies which have qualities that are unacceptable to responsible standards of conduct: it prohibits "parades, celebrations, and demonstrations" without prior approval without any regard to limiting its proscription to assemblies involving misconduct or disruption of government activities or non-peaceable gatherings. On this ground I do not feel that it is necessary to make a finding as to the nature of the demonstration.

See also *Marin v. University of Puerto Rico*, 377 F.Supp. 613, 626 (D.P.R. 1974) where the court, in addition to rejecting rules against demonstrations as vague and overbroad, also found them to be impermissible prior restraints. But see *Sword v. Fox*, 446 F.2d 1091 (4th Cir.), *cert. denied*, 404 U.S. 994 (1971).

In *Powe v. Miles*, 407 F.2d 73, 84 (2d Cir. 1968) the court distinguished between "registration" and "prior approval" and upheld a requirement that demonstrations be registered 48 hours in advance where 1) there was no indication the school would attempt to stop such demonstrations, but only desired to work out details "in good faith," and 2) the university had made it clear that it would not apply the rule to spontaneous demonstrations. The fifth circuit has also upheld a regulation requiring the "registration" of demonstrations in advance and has permitted discipline of students who ignored the regulation. In *Bayless v. Martine*, 430 F.2d 873 (5th Cir. 1970), 451 F.2d 561 (5th Cir. 1971)(per curiam), *cert. denied*, 406 U.S. 930 (1972), ten students challenged their suspensions for demonstrating against the war in Viet Nam. They were disciplined pursuant to a regulation which specified time, place and manner of permissible (but not impermissible) demonstrations and required "reservations" be made 48 hours in advance. *Id*. at 875. The court commented on actual events, *id*. at 876:

> There is no conflict in the evidence nor is any issue raised concerning the demonstrators' conduct. They sat upon the grass. They intended to be and were silent until the time of their suspensions. They had caused no injury to property themselves. They had attracted a crowd of on-lookers.

The court noted that there was disruption of some classes, but found that the students were disciplined solely for their violation of a valid, general regulation requiring that a reservation be made, Id. at 879:

> [T]he University's right to discipline an erring student is not contingent upon the extent of disruption caused by his direct disobedience of the regulation.

The students were, moreover, sitting in a place and at a time which was not authorized by the regulation, which had made available a "Silent Expression Area" for use between the hours of noon to 1:00 p.m. and 5:00 to 7:00 p.m. College officials were willing to accommodate the students on the change of location, but not hours. Concurring, Justice Thornberry pointed out that if the regulation were construed to prohibit all demonstrations it was overbroad. Id. at 880. He observed, however, that it only set forth rules for the one particular area, and that college officials were relying on more general authority to maintain order when disciplining the students in this case for their non-compliance with the school's time limitation. Id. at 881.

Some courts have upheld the school's right to deny the use of its facilities if it reasonably believes the activity planned would be illegal. In Sellers v. Regents of Univ. of Cal., 432 F.2d 493 (9th Cir. 1970), cert. denied, 401 U.S. 981 (1971), a student group sought the use of a university building for a "Vietnam Commencement" which would honor "young men who had taken a pledge not to serve in the armed forces during the Vietnam conflict." Id. at 495. The University Chancellor denied the request after counsel advised him such a meeting would violate the Selective Service Act which prohibits counseling, aiding, or abetting the evasion of the draft. The court found that the university acted reasonably and refused to consider whether or not the meeting would have been illegal or whether their construction of the Selective Service Act was unconstitutional. See also Handverger v. Harvill, 479 F.2d 513 (9th Cir.), cert. denied, 414 U.S. 1072 (1973) (the university officials relied on the same statute to deny a similar meeting and the court held that good faith was a valid defense to an action brought under 42 U.S.C. Sec. 1983). Finally, a court upheld a state university's denial of the right to have "a regional Vietnam Moratorium day observance". Clemson Univ. Vietnam Moratorium Comm. v. Clemson Univ., 306 F.Supp. 129 (D. S.C. 1969). The court emphasized the regional nature of the event and that the school would not be able to restrain outsiders by the threat of disciplinary action. In these cases, where the university was asked to make available a building that is not routinely made available to students, or to permit the use of its facilities by non-students, it should have greater discretion in deciding whether resources will be made available, so long as it treats all groups requesting such privileges equally and fairly and is equally generous to those expressing popular and unpopular views. For a case where facilities were routinely made available to anyone requesting them except plaintiff and where the court required a school district to rent an auditorium to plaintiff, see National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973). See also section III (A)(2), at pp. 69-71, supra and III (C), infra.

CONCLUSION

The courts reviewing discipline procedures in symbolic speech cases generally apply the principles of Tinker and require a clear possibility of substantial disruption before permitting school officials to regulate students. Generally, the display of a silent symbol or sign while the student is going about his or her normal business — and is in the right place at the right time -- will be protected. Only in extremely unusual situations, such as in the tense atmosphere accompanying a court-ordered school desegregation effort, will a ban on such displays be judicially countenanced. Other forms of symbolic speech often involve more noise, movement and sometimes disorder and violence which could be regulated as conduct rather than speech. In these cases the lower courts have typically said that they would apply the Tinker test and have found that substantial disruption did occur. Where the court is asked to consider prior approval of demonstrations, it should be clear that the prior restraint does not work on the free speech aspects of the demonstration. The rules should focus exclusively on reasonable details as to the time, place and manner of permissible and impermissible demonstrations. Prior restraint of buttons and other silent symbols where the bearer otherwise pursues a normal routine should be treated as prior restraints on pure speech and reviewed by the stricter standards set forth in Section III (A)(2) at 62-66, supra.

P.M. Lines
Center for Law and Education
July 30, 1975

III(A)(4) The Rights of Organizations

> We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press. "All these, though not identical, are inseparable." *Thomas v. Collins*, 323 U.S. 516 . . . (1945).

UMW of America v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967). The rights of students to band together into permanent groups is based squarely on the first amendment. Of course, these groups could exist off campus as well as on, but student organizations generally benefit from official recognition by school authorities. It helps the organization in finding members, facilities, and status. Where a school or university denies recognition to a group, the group could argue that the denial is an abridgement of freedom of speech, or the "right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This argument is obvious in cases where the group has banded together around the advocacy of a particular ideology or particular political goals. It is not as readily apparent for social groups. See *Waugh v. Board of Trustees*, 237 U.S. 598 (1915) (prohibiting Fraternities). *Hughes v. School Bd.*, 323 U.S. 685 (1945) (same); *Webb v. State Univ. of New York*, 125 F.Supp. 910, (N.D. N.Y.) (Judge L. Hand), *appeal dismissed*, 348 U.S. 867 (1954) (same). The latter may nonetheless claim a violation of equal protection, which is discussed in greater detail in this Manual in Section III(C), *infra*.

Political and ideological organizations -- even if unpopular -- are entitled to recognition if the school or university recognizes organizations at all, and they may be denied recognition for reasons relating to the particular political or other ideas forwarded by the organization. *Healy v. James*, 408 U.S. 169 (1972).

In *Healy*, students at a state college organized a local group patterned after the National Students for a Democratic Society (SDS) and sought the college's official recognition as a campus organization. The president of the college refused them recognition. The students sued and were denied relief in the district court and the court of appeals. The Supreme Court reversed and remanded the case.

Justice Powell, writing for the Court, held that the lower courts too easily discounted the existence of a cognizable first and fourteenth amendment interest and its infringement in this case. Citing several cases where the Court has held that a right to associate exists, he stated, 408 U.S. at 181-182:

> There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right. The primary impediment . . . is the denial of use of campus facilities for meetings and other appropriate purposes. . . .
>
> Petitioners' associational interests also were circumscribed by the denial of the use of campus bulletin boards and the school newspaper. . . . Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.

The college argued that the students' rights were not infringed as they still could meet as a group off campus, they still could distribute literature off campus, and they still could meet together on campus -- as individuals. Justice Powell dismissed that argument, 408 U.S. at 183:

> [T]he Constitution's protection is not limited to direct interference with fundamental rights. . . . [T]he group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's actions. We are not free to disregard the practical realities.

Moreover, the Court held that "the effect of the college's denial of recognition was a form of prior restraint" which placed a "heavy burden" on it to demonstrate the appropriateness of its action, rather than the students having the burden to show they were entitled to recognition.

Justice Powell then examined the four possible justifications the school relied upon in refusing to recognize the group. First, the school observed that the organization was affiliated with a national group of questionable reputation. This was not sufficient as a justification, as rights and privileges of a citizen cannot be infringed because of guilt by association alone. "The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." 408 U.S. at 186.

Second, "The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition." 408 U.S. at 187.

Third, the court agreed with the college that it could properly refuse recognition of a group that was actually disruptive; but the Court found no evidence of actual disruption. The Court referred to Brandenburg v. Ohio, 395 U.S. 444 (1969), where a distinction was made between mere advocacy and advocacy inciting imminent lawless action. While schools may prohibit lawless action, they can also prohibit acts that materially and substantially disrupt discipline. Despite this broader power to regulate action, the distinction between advocacy and action is still valid in defining when the state's interests are sufficient to interfere with first amendment rights in the school context.

Fourth, and the only possible legal basis the Court saw for denying recognition, the Court ruled that if retrial established that there was a requirement that all recognized groups affirm that they would comply with reasonable campus regulations and that SDS refused, recognition could be denied. "[T]he benefits of participation in the internal life of the college community may be denied to any group that reserves the right to violate any valid campus rules with which it disagrees." 408 U.S. at 193-194. Because the record was unclear whether the SDS would promise to abide by reasonable regulations, the case was remanded. The Court's reference to "valid" rules is noteworthy.

In a case subsequent to Healy, a court found sufficient evidence that a proposed chapter of the Young Socialist Alliance, "by its constituency and its admitted purposes," went beyond mere advocacy and thus could be denied campus recognition. Merkey v. Board of Regents, 344 F.Supp. 1296 (N.D. Fla. 1972), vacated as moot, 493 F.2d 790 (5th Cir. 1974). The court found it significant that two of the applicants for the organization had been arrested for disruptive activity both on and off campus and that one had since been expelled.

However, a court has found it insufficient to deny recognition that the group might institute "'frivolous, vexations, and harassing [court] actions to impede the legitimate function of the university.'" University of S. Mississippi Chapter of the Mississippi CLU v. University of S. Mississippi, 452 F.2d 564, 566 (5th Cir. 1971). See also ACLU of Virginia v. Radford Col., 315 F. Supp. 893 (W.D. Va. 1970) (granting declaratory relief to organization seeking college recognition); Garvin v. Rosenau, 455 F.2d 233 (6th Cir. 1972) (holding that denial of recognition stated claim to relief); Hudson v. Harris, 478 F.2d 244 (10th Cir. 1973); Dixon v. Beresh, 361 F.Supp. 253 (E.D. Mich. 1973) (finding unconstitutional high school's refusal to recognize two organizations).

Once a campus organization has been recognized or registered, the school can not treat it differently from other recognized or registered groups. In Wood v. Davison, 351 F.Supp. 543 (N.D. Ga. 1972) the University of Georgia denied a registered homosexual group the right to use university facilities for a regional conference to organize a Southeastern homosexual organization and dance. The court reversed the school's decision on first amendment grounds as enunciated in Healy. The court noted this was a prior restraint and thus the school had a heavy burden to justify it. Moreover, the school has to notify the organization of its objections and to give it a reasonable time to cure the irregularity. The school must provide the organization with minimal due process -- notice and an opportunity to be heard.

A similar problem arose in Gay Students Organization of the Univ. of New Hampshire v. Bonner, 367 F.Supp. 1088 (D.N.H. 1974), modified and aff'd, 509 F.2d 652 (1st Cir. 1974). A state university had denied the use of its facilities to an already recognized homosexual group for social functions. The lower court held that because of "the pervasive importance of social functions in the university setting" Healy extends first amendment protection to cover dances and other social events. The appellate court acknowledged that a university has latitude in regulating social organizations, "its efforts to restrict the activities of a cause-oriented group like the GSO stand on a different footing." 509 F.2d at 659. The appellate court based its decision on the associational rights of GSO members, as well as free speech. Id. at 660-663.

This case also provides an alternative basis for the ruling which could be useful to social organizations generally. The lower court also relied on the equal protection clause, stating that "a state authority must deal with similarly situated organizations in an even-handed manner." 367 F.Supp. at 1097. The appellate court was silent on this issue. Cf. Florida State Univ. Chapter, Local 1880 of the AFT v. Florida Bd. of Regents, 355 F.Supp. 594 (N.D. Fla. 1973) (a state university can not deny the use of its facilities to a union when it permits other similarly situated organizations those privileges.)

Of course, where organizations seek to hold demonstrations, mass meetings or similar activities, the school or university has some power to limit or deny use of its facilities where there is a valid reason for doing so -- such as pre-existing commitment to another event. The standard to be used in deciding whether the university has acted properly in such cases is discussed in section III(A)(3), at pp. 89-90, supra. Likewise, organizations are not privileged under the first amendment to demand special privilege or special support. A school does not infringe on the rights of an organization when, as a party to the contract, it cancels an order for a film which it determined, after previewing it, would be inappropriate to sponsor as part of its educational program, provided there is no constitutional violation. Associated Students of Western Kentucky Univ. v. Downing, 475 F.2d 1132 (6th Cir., cert. denied, 414 U.S. 873 (1973). Nor is a university required to collect voluntary student fees for a recognized group. Curran v. Beneyet, 79 Misc.2d 547, 360 N.Y.S.2d 582 (Sup. Ct. 1974).

The general right to free speech and assembly has also been applied to protect the membership lists of organizations from state inspection in certain situations. NAACP v. Alabama, 357 U.S. 449 (1958); see also Bates v. Little Rock, 361 U.S. 516 (1960). This general principle was also in issue in Eisen v. Regents of Univ. of Calif., 269 Cal. App. 2d 696, 75 Cal. Rptr. 45 (Ct. App. 1969), where the university sought disclosure of records disclosing names of officers and the purpose of the organization as a condition to official recognition as a campus organization. The trial court dismissed the case and the court of appeals affirmed, finding the state's compelling interest in knowing who was using university facilities sufficiently strong to justify this minimal infringement on plaintiff's rights. The court noted, "the absence of any immediate and direct threats of physical or other danger, as were admittedly present in NAACP v. Alabama . . . ." 75 Cal. Rptr. at 51. See also 37 ALR 3d 1311.

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July 15, 1975

III(A)(5) Access to Views of Others

SPEAKERS

In a number of cases involving speakers excluded from university campuses by administrators, courts have found that the exclusion violated the first amendment, in particular the right of the audience to hear the speaker.[*] Thus, in Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969) the court said: "The First Amendment . . . embraces the right to hear." See also Molpus v. Fortune, 311 F.Supp. 240, 245 (N.D. Miss.), aff'd, 432 F.2d 916 (5th Cir. 1970)(Clearinghouse Review No. 16,924), Lamont v. Postmaster General, 381 U.S. 301 (1965). Accordingly students denied the right to hear have standing to sue even if the potential speaker does not join as a plaintiff. Smith v. University of Tenn., 300 F.Supp. 777, 780 (E.D.Tenn. 1969).

Many of the cases have involved something less than unanimous or even substantial sentiment on the part of the student body to hear the speaker. Usually there was only a small group desiring to hear a person with unpopular views. This has not deterred most courts from finding that the right to hear still controlled. In Molpus, the question was whether a Black man could speak at the University of Mississippi, where there were only 200 Black students out of 6,000. The court found for the minority who had invited the speaker, saying: "The rights here involved are First Amendment Rights -- the right to peaceably assemble, the right to speak, and the right to hear . . . . The right to hear is applicable to a state university." Id. at 245. The appellate court rejected plaintiff's request for more comprehensive relief which would shift to the school the burden of taking the speaker issue to court when it desires to bar a speaker. 432 F.2d 916.

Often courts couple the first amendment right to hear a speaker with the first amendment right to associate. In Healy v. James, 408 U.S. 169, 181 (1972), the Court explained:

> Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.

The court in Snyder v. Board of Trustees of Univ. of Illinois, 286 F.Supp. 927 (N.D.Ill. 1968), found the right of students to listen to be bound up with the associational right. The court said, id. at 932:

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[*] Another part of this manual deals with the right of speakers to have access to a forum controlled by the school. See Part III (A)(2), at 67-71 supra.

> . . . we see no reason why the audience should be precluded from asserting their interests, merely because the speaker is disinclined to wage a legal battle. There is a First Amendment right to peacefully assemble to listen to the speaker of one's choice, which may not be impaired by state legislation any more than the right of the speaker may be impaired.

In many of the cases in this area, if not in all, the courts distinguish between the universities' obligation to have a policy of permitting outside speakers, and, once they adopt such a policy, their constitutional duty to operate it fairly and without discrimination against the content of any particular speech. In short, once a university permits outside speakers, it must allow all speakers invited by legitimate campus groups as long as the speakers do not create a clear and present danger of materially disrupting the functioning of the campus. See, e.g., Stacy v. Williams, 306 F.Supp. 963 (N.D.Miss. 1969), aff'd, 446 F.2d 1366 (5th Cir. 1971). There, discussing the university's regulations governing off-campus speaker policy, the court said that students' rights to hear or speak could not be exercised whenever and wherever they desired, and likewise, id. at 970-71:

> . . . neither is the power of the Board, upon consent to outside speakers, so unfettered that it can be exercised in censorship over what is and what is not acceptable or in other arbitrary fashion. . . .
>
> . . . As it opens the lecture halls it must do so nondiscriminatorily.

(In a sequel to this case, the court came very close to citing the university for contempt in rescinding permission previously granted to let Charles Evers speak. It did not do so because the action should properly have originated with the same three judge court which entered the order in 1969. Stacy v. Williams, 312 F.Supp. 742 (N.D. Miss. 1970).

In Snyder v. Board of Trustees of Univ. of Illinois, 286 F.Supp. 927, 933 (N.D.Ill. 1968), the court made the same point as was made in the 1969 Stacy decision:

> It is clear from the record here that the University of Illinois has adopted an open door policy with regard to guest speakers, allowing any guest speaker who had been invited by a recognized student group, to speak at a reasonable time, space permitting; but that the University denied plaintiffs the opportunity to hear the speaker of their choice, solely on the basis of the speaker's associations and the views to be espoused.

The legal basis for this requirement of non-discriminatory policies has varied. In some cases courts have said that any regulations which govern speech are to be treated with suspicion, and will be acceptable only if based on a narrow clear and present danger standard. Id. at 933. On the other hand, in Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969), the court found constitutionally unacceptable a situation where a university had no regulations governing off-campus speakers and the university president had total discretion to choose. Here, the court based its finding on the reasoning id. at 1172-73, that --

> such a situation of no rules or regulations may be equated with a licensing system to speak or hear and this has been long prohibited. Cantwell v. Connecticut (citation omitted).

Dickson v. Sitterson, 280 F.Supp. 486 (M.D.N.C. 1968) treated virtually the same factual situation slightly differently under the law. The regulations of the University of North Carolina prohibited any speakers who were Communists, who had taken the fifth amendment with regard to questions about their communist activities, or who were known to advocate the overthrow of the constitutions of the United States or North Carolina. The court noted that many speakers came to the campus each year. Regarding speakers whose Communist affiliations would have disqualified them under the regulations, the court held that they could speak because the regulations were unconstitutionally vague. (However, in dicta the court appeared to accept the constitutionality of more specific regulations that prohibited Communists from speaking). See also *Duke v. Texas*, 327 F.Supp. 1218, 1228 (E.D. Tex. 1971), *rev'd on other grounds*, 477 F.2d 244 (5th Cir.) *cert. denied*, 415 U.S. 978 (1973), where the court stated that standards of permissible vagueness in statutes and regulations are strict where first amendment rights are involved. In general, once a university adopts a policy allowing recognized campus groups to invite speakers, the regulations by which the university may deny permission for the appearance of speakers must be clearly and narrowly worded. *Smith v. University of Tennessee*, 300 F.Supp. 777 (E.D. Tenn. 1969). For further discussion of cases involving the issues of vagueness and overbreadth in the universities' rules stipulating when speakers may be invited, see Part III (A)(6) at pp. 102, 105, *infra*.

In *Vail v. Board of Educ. of Portsmouth Sch. Dist.*, 354 F.Supp. 592 (D.N.H. 1973), *remanded for fuller relief*, 502 F.2d 1159 (1st Cir. 1973), the court examined school rules governing not only distribution of literature but also access to speakers. The district court did not include any provision for outside speakers in its original decision, because the speaker whom the students sought to hear was a Socialist Workers Party candidate for an election which was over. The court merely asked the parties to settle the matter (and certain literature distribution rules) amicably. As this seemed impossible, the plaintiffs appealed. The circuit court indicated in an unpublished opinion that the district court should make a definitive ruling on the speaker policy, and advised that the absence of standards left too much discretion in the hands of the school officials. (Civil No. 73-1243, Dec. 4, 1973: under first circuit rule, not to be used as precedent in unrelated cases.) The final district court order is reproduced as an appendix to Part III (A)(2) at 75-80, *supra*. Briefly, the court ordered the school to permit any student to request permission to invite any speaker, and required that the school grant such permission on a first-come, first-served basis, and make a certain number of days available each year for this purpose.

In cases where the off-campus speakers were to be paid by the universities, the same basic principles should apply. In *Brooks v. Auburn Univ.*, 412 F.2d 1171, 1173 (5th Cir. 1969), the court held that absent a claim that the speaker's appearance would lead to violence or disruption, the university president could not refuse to have a speaker or pay his fees and expenses when that speaker had been invited under normal procedures. A university has no obligation to spend its money on outside lecturers, but if it does so then it must do so equitably and without discrimination against the content of their ideas, except insofar as those ideas may be materially disruptive. *Cf. Associated Students of Western Kentucky Univ. v. Downing*, 475 F.2d 1132 (6th Cir.), *cert. denied*, 414 U.S. 873 (1973) (school permitted to cancel its co-sponsorship of a film). One way to satisfy the constitutional standards which have been set up in this area would be for every recognized student group to have a pro-rata share of the money which the university allocates for outside speakers. Or, a lottery system which awarded money to some of the campus groups, could be used if there were not enough money for all groups.

TEXT BOOKS

With regard to a school or university's obligation under the first amendment to have certain books on its shelves, the general principles discussed above concerning speakers are applicable. A principal or school board may not act arbitrarily or capriciously in rejecting the requests of teachers, parents, or students for text or library books. A school should not be required to buy every book, but should allow representation of those who have a legitimate interest in its policies: parents, students, teachers, community members, and administrators. Cf., Vought v. Van Buren Pub. Sch., 306 F.Supp. 1388 (E.D.Mich. 1969) (due process case; finding a right of the student to possess certain literature disapproved by the school).

Although it upheld the decision of a school board to disregard the recommendations of its teachers regarding the purchase of two novels for inclusion in a course curriculum, Minarcini v. Strongsville City Sch. Dist., 384 F.Supp. 698 (N.D. Ohio 1974) does not contradict the trend in speaker cases. The Minarcini court issued an elaborate discussion of the procedures followed by the school board in that particular case. Emphasizing the fact that there was no issue of obscenity, the court held in favor of the school board because of Ohio's mandate to boards of education to purchase textbooks and because the board in question acted upon the recommendations of representatives of various constituencies. Id. at 706. The district court carefully noted that had the board acted arbitrarily or capriciously, plaintiffs' first and fourteenth amendment rights would have been violated. Id. at 706. The court was aware that students could obtain the books in the library, and that fact suggests another possible basis on which Minarcini is distinguished from speaker cases: only a limited number of books may be included in a course curriculum, while there is an opportunity to invite many speakers (or purchase many library books).

Similarly, Presidents Council, Dist. 25 v. Community Sch. Bd. No. 25, 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972), is not contrary to the speaker cases. Although the second circuit refused to review the decision of a school board to remove a particular book from a junior high school library, the court fully recognized plaintiffs' first amendment argument. The holding was prompted by the undisputed record that the New York legislature had delegated responsibility for selection of library materials to community school boards.

Thus, whereas the speaker cases generally involved circumstances in which student organizations were delegated the privilege of inviting speakers, the textbook cases entail situations where the responsibility rests with the school board, having been delegated by the state. Only if the school board acts arbitrarily or capriciously in denying student access to certain books will a court intervene to protect first amendment rights.

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III(A)(6) Overbreadth

THE OVERBREADTH DOCTRINE

Sometimes laws or regulations are drafted so that they prohibit both protected and unprotected conduct or expression. Where a law is drafted in such a way that the proscriptions on protected and unprotected activity cannot be separated, the entire law must fail. The basic rule of the overbreadth doctrine, as expressed by the Supreme Court in the classic case of Thornhill v. Alabama, 310 U.S. 88, 97 (1940) requires the courts to invalidate a statute which:

> . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.

The Court in Thornhill feared that the overbroad law would have a "chilling effect" on the exercise of free speech rights, because only the most bold would continue to assert these rights in a robust manner, while others would exercise greater restraint, in order to stay within the confines of the overly broad law. The overbreadth doctrine has been used to strike down broadly drawn laws prohibiting picketing, Thornhill v. Alabama, 310 U.S. 88 (1940); soliciting by an attorney, NAACP v. Button, 371 U.S. 415 (1963); breach of the peace, Brown v. Louisana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); the display of a red flag as a symbol of opposition to organized government, Stromberg v. California, 283 U.S. 359 (1931); and obscenity, e.g. Miller v. California, 413 U.S. 15 (1973). This rule, in its classic form, also applies to the school environment. As observed by one court striking down state-wide regulations forbidding demonstrations on campus without prior approval:

> [T]hese regulations are grossly overbroad, sweeping within their net both the perfectly harmless -- a single, silent protester holding a sign in the middle of the campus in mid-day -- and the extremely dangerous. Such broadside attacks on the rights of free expression are repugnant to our constitutional scheme.

Marin v. University of Puerto Rico, 377 F.Supp. 613, 626 (D.P.R. 1974). See also Nitzberg v. Parks, Civ. No. 74-1839, 4th Cir. Apr. 14, 1975. Jacobs v. Board of Sch. Comm'rs, 490 F. 2d 601 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975); Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960 (5th Cir. 1972); Eisner v. Stamford Bd. of Educ., 440 F.2d 803

(2d Cir. 1971); Jones v. Board of Regents of Univ. of Ariz., 435 F. 2d 618 (9th Cir. 1970); Cintron v. State Bd. of Educ., 384 F.Supp. 674 (D.P.R. 1974) (three-judge court); Cf. Papish v. Board of Curators, 410 U.S. 667 (1973) (lower courts upheld a challenged regulation against overbreadth charges: they were reversed without reference to this point).

In Papish a district court and the eighth circuit upheld a rule which forbade "indecent conduct or speech." 331 F.Supp. 1321, 1322 (W.D. Mo. 1971), aff'd, 464 F.2d 136 (8th Cir. 1972), rev'd, 410 U.S. 667 (1973). The Supreme Court did not specifically comment on the overbreadth issue when it reversed, but the decision is clear that the attempted regulation (of distribution of an underground newspaper containing some vulgarities) was in violation of the first amendment. Inasmuch as the regulation authorized disciplinary action against students for protected speech, as well as genuinely obscene speech, it was obviously overbroad.

A sister doctrine to the overbreadth rule is the rule against vagueness. While overbreadth is a problem more uniquely limited to free speech areas, vagueness is a potential problem wherever a serious sanction is to be imposed. Nonetheless, since any vague statute runs the risk of permitting judge or jury to construe it with an overbroad result the cases applying this doctrine should also be consulted. See section III (D) (2), infra, p. 193 et seq. of this manual for a discussion of these cases. There is no essential difference between statutes held to be vague in free expression cases and those held to be overbroad, other than semantic. When applied to free expression situations, the vagueness problem is identical to the overbreadth problem. Compare, for example, the Thornhill principle to that ennunciated in Grayned v. Rockford, 408 U.S. 104, 109 (1972):

> . . . where a vague statute "abut[s] upon a sensitive area of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

In Grayned the Supreme Court struck down an anti-picketing ordinance which attempted to bar such activity from the vicinity of a school, while upholding an anti-noise ordinance.

There is, however, one essential legal difference between overbreadth and vagueness in the free speech context. While a vague rule which touches upon first amendment rights is necessarily overbroad, the overly broad rule is not necessarily vague. An overly broad rule can also be one which explicitly and clearly forbids conduct which can also include protected first amendment rights. For example, a law barring speakers from campus if they have ever pleaded the fifth amendment is quite clear, but it inhibits protected free speech beyond what is necessary to any legitimate educational function. See, e.g., Dickson v. Sitterson, 280 F.Supp. 486 (M.D. N.C. 1968) (three judge court).

The overbreadth doctrine is most pertinent where a law attempts to regulate some improper conduct, and does so in a way which permits authorities to regulate expression as well. Therefore, the overbreadth issue is likely to arise in cases where speech and conduct are mixed.

Overbreadth also applies where the law or regulation attempts to regulate those words which are classified as beyond the protection of the first amendment -- obscenity, "fighting words," and defamation. Here the overbreadth doctrine would require narrow and precise definitions of the forbidden words (or other forms of expression). See section III (A)(2) supra at 48-55.

In the school context overbreadth usually is an issue in cases involving such forms of expression as display of symbols, the publication and distribution of literature, the staging of a demonstration, or the invitation of outside speakers.

A leading recent case is Jacobs v. Board of Sch. Comm'rs, 490 F.2d 601, 604 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975). The court voided the following rule:

> No student shall distribute in any school any literature that is . . . either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others.

The court said, id. at 605-06:

> [The rule is] . . . unconstitutionally overbroad. In United States v. Dellinger, . . . 472 F.2d at 357, this court stated: "The doctrine of overbreadth applies when a statute lends itself to a substantial number of impermissible applications, such that it is capable of deterring protected conduct, when the area affected by the challenged law substantially involves first amendment interests, and when there is not a valid construction which avoids abridgement of first amendment interests." . . . These factors are present here.
>
> The overbreadth stems both from the vagueness described above and from the inclusiveness of the phrase "productive of, or likely to produce" in the proviso. Expression may lead to disorder under many circumstances where the expression is not thereby deprived of first amendment protection. . . . We do not read Tinker as authorizing suppression of speech in a school building in every such circumstance where the speech does not have a sufficiently close relationship with action to be treated as action. . . .
>
> Where the boundaries between prohibited and permissible conduct are ambiguous, we can not presume that the curtailment of free expression is minimized. . . . [The regulation] at least threatens a penalty for a student who distributed a controversial pamphlet in a lunchroom resulting in robust arguments or who distributed a newspaper including derogatory but not defamatory remarks about a teacher. Absent extraordinary circumstances, the school authorities could not reasonably forecast substantial disruption of or material interference with school discipline or activities arising from such incidents.

The Jacobs court also invalidated rules which prohibites sales of literature, and distribution of literature in exchange for contributions, as well as any "commercial activity." Id. at 608-09:

> Sale of the newspaper, or other communicative material within a school, is conduct mixing both speech and non-speech elements. In order to determine whether a "sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms " We must consider whether the regulation "is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968). . . .
>
> Ultimately, defendants rely on the proposition that "Commercial activities are time consuming unnecessary distractions and are inherently disruptive of the function, order and decorum of the school."
>
> . . . It has not been established, in our opinion, that regulation of the place, time, and manner of distribution can not adequately serve the interest of maintaining good order and an educational atmosphere without forbidding sale and to that extent restricting the first amendment rights of plaintiffs.

Finally the Jacobs court enjoined a rule prohibiting "any literature that is . . . obscene as to minors. . . ." The court noted that the rule had no "specific definition of sexual conduct as required in Miller." Id. at 609.

The school district in Jacobs also attempted to forbid distribution of literature which was not written by students or school employees. Id. at 606-07:

> Defendants suggest that student distribution of materials written by non-students and outside organizations tends to produce disorder and interference with school functions, and cite the example that "stores would undoubtedly pay students to distribute flyers advertising their products." Assuming, however, some area of possible validity, the rule is overbroad. It would prohibit use of materials written by individuals from all sorts of walks of life whose views might be thought by the students to be worthy of circulation. "Predictions about imminent disruption . . . involve judgments appropriately made on an individualized basis, not be means of broad classifications, especially those based on subject matter." Police Dept. of Chicago v. Mosley, 408 U.S. 92 . . . (1972).

A rule requiring that the source of all literature be identified was also struck down as going beyond anything necessary to maintain order and decorum in the school. Id. at 607.

Even a rule attempting to ban distribution while classes were in session was struck down, since the court found that there were periods at noon and late in the school day where only a few classes were in session and substantial numbers of students were still on campus. Id. at 609.

Other prohibitions which have been judged overbroad by the courts include, for example, prohibitions on:

- "misconduct." Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969), aff'd, 295 F.Supp. 978 (W.D. Wis. 1968).
- "hand-out items, including handbills . . . on the campus grounds or in campus buildings at any time," except program items which are officially related to authorized meetings and which are distributed in the room or rooms assigned to the event in question. Jones v. Board of Regents of Univ. of Arizona, 436 F.2d 618 (9th Cir. 1970).
- "disorderly disturbance or course of conduct directed against the administration or policies of . . ." the college or university, despite a limitation to doing this by "means which are not protected by the constitution . . . ." Undergraduate Student Ass'n v. Peltason, 367 F. Supp. 1055 (N.D. Ill. 1973). Accord, Corp. of Haverford Col. v. Reeher, 329 F.Supp. 1196, 1207, 1213 (E.D. Pa. 1971); But see Lowery v. Adams, 344 F.Supp. 446 (W.D. Ky. 1972) (upholding a rule forbidding "disruptive or disorderly conduct").
- literature which is "obscene or libelous" or "reasonably lead[s] the principal to forecast substantial disruption of or material interference with school activities." Nitzberg v. Parks, Civ. No. 74-1839 (4th Cir. Apr. 14, 1975)(Clearinghouse No. 17,257).
- "libelous or obscene language, advoca[cy] of . . . illegal actions, or [material which is] . . . grossly insulting to any group of individual . . . ." Baughman v. Freienmuth, 478 F.2d 1345, 1347, 1350-51 (4th Cir. 1973) (emphasizing the absence of explicit definitions).

- speakers who do not have "competence and topic . . . relevant to the approved constitutional purpose of the organization." Smith v. Univ. of Tennessee, 300 F.Supp. 777 (E.D. Tenn. 1969).

- any speaker who "intends to present a personal defense against alleged misconduct or crime which is being adjudicated . . . ." Id.

- speakers who "might speak in a libelous, scurrilous or defamatory manner or in violation of public laws which prohibit incitement to riot . . . ." Id.

- speakers who appear on campus at a time which is not "in the best interests of the University." Id.

- guest speakers who are representatives of "any subversive, seditious, and un-American organization . . . ." Snyder v. Bd. of Trustees of Univ. of Illinois, 286 F.Supp. 927 (N.D. Ill. 1968).

- on-campus speakers "who will do violence to the academic atmosphere of" state colleges and universities as well as speakers who are "persons in disrepute from the area from whence they come . . . and . . . any person who advocates a philosophy of the overthrow of the government of the United States." Stacy v. Williams, 306 F.Supp. 963 (N.D. Miss. 1969) (three judge court).

- talks by "known member[s] of the Communist Party," persons "advocat[ing] the overthrow of the Constitution of the United States or . . . North Carolina" and persons "plead[ing] the Fifth Amendment . . . in refusing to answer any question, with respect to Communist or subversive connections . . . ." Dickson v. Sitterson, 280 F.Supp. 486 (M.D.N.C. 1968) (three judge court).

- "The celebration of pickets, marches, meetings and other demonstrations at any places of the University . . . [without] previous notification and consultation of the Chancellor . . . who will approve the place, hour and the day in which these acts will take place in a way that they will not interrupt the educational tasks and good order of the university." Marin v. University of Puerto Rico, 346 F. Supp. 470,473 (D.P.R. 1972) (rule is quoted in this decision, where court granted preliminary relief); 377 F.Supp. 613, 628 (D.P.R. 1974) (three judge court).

- "acts not authorized by . . . University officials." Id., 346 F.Supp. at 474 (for rule); 377 F.Supp. at 628 (for invalidation by court).

- "improper or disrespectful conduct in the classroom or campus . . . ." Id.

- "acts . . . that . . . will . . . affect the good, normal functioning of the operations and procedures of the university". Id.

- "organizing, instigating, inciting, directing and/or participating in student pickets on school ground and in the buildings . . . [and] using loud speakers within the school premises without written authorization . . . or outside the school premises if the institutional order i[illegible]ffected." A three judge court summarily held the rule vague and overbroad as applied to activities outside school premises. Cintron v. State Bd. of Educ., 384 F.Supp. 6[illegible]4 (D.P.R. 1974). After more thorough discussion, the court also held the law invalid [illegible] the school context pointing out that the phrase "affect the institutional order" was "incapable of precise definition." Id. at 678.

●"refusal to obey . . . a lawful regulation or order of any institution of higher education, which refusal, in the opinion of the institution, contributed to a disruption of the activities, administration or classes of such institution . . . ." Corp. of Haverford College v. Reeher, 329 F.Supp. 1196, 1209-10, 1213 (E.D. Pa. 1971) (three judge court) (suspension of financial aid was penalty for violation.)

●conduct leading to a conviction where the conduct was "committed in the course of disturbing, interfering with or preventing, or an attempt to disturb, interfere with or prevent the orderly conduct of the activities, administration or classes of an institution of higher education." Id. at 1209, 1213.

●conduct which leads to a criminal conviction for engaging in "force, disruption, or the seizure of university property . . . [where] such crime was of a serious nature and contributed to a substantial disruption of the administration of the institution . . . ." Rasche v. Board of Trustees of Univ. of Illinois, 353 F.Supp. 973 (N.D. Ill. 1972) (invalidated law codified in 20 U.S.C. 1088f(a)) (three judge court; sanction was financial aid cut-off.)

●an organization whose "role and purpose . . . lies [sic] basically outside the scope and objectives of this tax supported educational institution." ACLU of Virginia v. Radford Col., 315 F.Supp. 893 (W.D.Va. 1970) (striking down resolution denying college recognition to the ACLU).

●Another group of cases has struck down laws requiring prior approval of literature distributions or demonstrations. As noted in Section III (A) (2), at pp. 63-66, there is some argument for rejecting any prior restraint in a school setting. However, some courts explicitly upheld prior restraint in theory and then rejected as overbroad the particular rules requiring prior review for failure to specify clearly the kinds of literature or other expression subject to the rule. Nitzberg v. Parks, Civil No. 74-1839 (4th Cir. 14, 1975); Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973); Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960, 976-77 (5th Cir. 1972); Quarterman v. Byrd, 453 F.2d 54, 58-59 (4th Cir. 1971). Baughman also specifically condemned the failure to use the technical definitions of "libelous" and "obscene." 478 F.2d at 1349. Accord, Jacobs v. School Comm'rs, 490 F.2d, 601, 609 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975).

All of the above examples of rules and regulations were voided because of overbreadth. In all of these cases the courts gave considerable weight to the plaintiff's freedom of speech and required school officials to carry a heavy burden of justification for the rule in issue. In all of these cases, comparable non-school Supreme Court decisions dealing with free speech and overbreadth were cited and relied upon. This is in accord with a long-standing rule which requires stricter standards for statutes and regulations which could be used to regulate free expression.

An example of one court's language serves to illustrate the type of analysis contained in all of the above decisions. In Corp. of Haverford College v. Reeher, 329 F.Supp. 1196, 1210 (E.D. Pa. 1971), the court observed that:

> The cautious student, well aware that he acts unwittingly in many ways which might be categorized as offenses (e.g., failure to carry his draft card, littering, etc.) will shy away from actions which might be characterized as disturbing or interfering with the orderly conduct of the university, and thus will be deterred from First Amendment activities which might fall within those descriptions. This is precisely the result against which the principle of overbreadth attempts to guard. See N.A.A.C.P. v. Button, . . . 371 U.S. at 433, 83 S.Ct. 328. Since subsection (a)(3) sweeps so broadly as to invade the area of protected First Amendment freedoms it is unconstitutionally overbroad.

There are some adverse decisions that should be scrutinized, however. In one case, the fourth circuit upheld a college regulation which forbade demonstrations without prior clearance, and which flatly banned all demonstrations which were to take place in any campus building. Sword v. Fox, 446 F.2d 1091 (4th Cir.) cert. denied, 404 U.S. 994 (1971). "Demonstration" was defined as follows: 317 F.Supp. 1055, 1067-69 (W.D. Va. 1970):

> . . . a public manifestation of welcome, approval, protest, or condemnation as by a mass meeting, procession, picketing, or occupation of premises. (Exhibitions commonly associated with social or athletic activities are not within the purview of this policy and its supporting regulations.)

It is clear the other courts, cited above, would examine the facts closely, and require the school authorities to establish with concrete proof their contention that indoor demonstrations always are disruptive. An absolute bar to all demonstrations taking place inside any building seems obviously overbroad, especially in view of the exception for "exhibitions" for athletic events. The exception itself illustrates that the college can tolerate some activities beyond classroom instruction and movement to and from classrooms in the buildings. The fourth circuit, however observed that the buildings were usually in use for classes, administration, research, health activities or student residence, where "order and study are expected." Id. at 1097. As for a ban on night-time demonstrations, the court cited the increased opportunity for vandalism in non-residential buildings, and the need for quiet in dormitories. Id. at 1098-99. The court then found the regulation reasonable as a "prior restraint" (citing authorities which do not necessarily support that view). It next went on to an analysis of the overbreadth issue. Its discussion here was typical of the analysis found in non-speech cases where vagueness of a rule has been raised as a possible constitutional infirmity. See Part III (D)(2) infra. The opinion does not cite any of the classic Supreme Court cases dealing with overbreadth, such as Thornhill v. Alabama.

In a similar case, Banks v. Board of Public Instr. of Dade County, 314 F.Supp. 285 (S.D. Fla. 1970) a three judge court upheld a Florida statute which gave school principals authority to suspend pupils for "willful disobedience, for open defiance of authority of a member of his staff, for use of profane or obscene language, for other serious misconduct, and for repeated misconduct of a less serious nature." This was affirmed per curiam in 450 F.2d 1103 (5th Cir.), vacated for technical reasons, 401 U.S. 988 (1971). The district court again did not cite the classic overbreadth cases but relied exclusively on an analysis typical in vagueness cases.

These decisions go against the weight of authority of both Supreme Court and other federal cases. Possibly the overbreadth issue was not properly raised or briefed. Possibly, for example, in Sword the court saw the issue primarily as one setting "reasonable" limits on demonstrations and did not carefully analyze the other challenges to the rule. Later, the fourth circuit, in Nitzberg v. Parks, Civil No. 74-1839 (4th Cir. Apr. 14, 1975) adopted the more traditional view, which looks beyond mere reasonableness and requires the school to show its regulations were essential.

In Banks the court was dealing with students who were suspended for conduct -- one for possessing marbles, and the other, an intermediate school pupil, for being present in an elementary school (id. at 293-94) -- and the free expression issue was not squarely before it. (However, another plaintiff who had been charged with violation of a rule requiring a flag salute successfully challenged the rule as applied to him.) The court in Banks also read the challenged statute as a broad delegation of authority, and not a precise requirement. Id. at 290:

> [The statute] delegates to the county school boards the power to promulgate rules and regulations for the control, discipline, and suspension of students. . . . [Another statute] empowers the county school boards to adopt such policies, rules and regulations as are deemed necessary for the efficient operation and general improvement of the county school system. . . . [The statute in question] therefore, is merely a statute specifically limiting the authority of the principal to suspend, and even without it, authorities, by virtue of the cited statutes, as well as the powers inherent in their offices, have the power to suspend and otherwise discipline students for misbehavior.

Also, these cases preceded Grayned v. Rockford, 408 U.S. 104 (1972) and Papish v. Board of Curators, 410 U.S. 667 (1973). Although neither is treated as an overbreadth case by the Supreme Court, they suggest an analysis which would require greater toleration of free expression in the school setting and more stringent limitations on regulations attempting to restrict such expression.

WHO MAY CHALLENGE?

The general rule in non-school cases permits anyone charged with a violation to challenge the regulation, regardless of whether the facts tend to prove that the challenger was actually engaging in conduct which the state could properly regulate, or instead was exercising a first amendment right. E.g., Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); Gooding v. Wilson, 405 U.S. 518, 520-21 (1972).

As the Supreme Court has ruled in Gooding v. Wilson, id.:

> It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution," Dombrowski v. Pfister, 380 U.S. 479, 491, 85 S.Ct. 1116, 1123, 14 L.Ed.2d 22 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity," id., at 486. . . . This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

This rule has also been extended to school cases. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Jacobs v. Bd. of Sch. Comm'rs, 490 F.2d 601, 606 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975); Marin v. University of Puerto Rico, 377 F.Supp. 613, 624 (D.P.R. 1974); Haverford Col. v. Reeher, 329 F.Supp. 1196, 1209 (E.D. Pa. 1971) (three judge court) ("In evaluating a statute's reach, we must consider its potential effects not just its proven effects.") However, in some cases where the court characterized the students' activities as disruptive conduct and not expression, it has refused to consider overbreadth challenges to extremely broad and imprecise regulations. E.g. Lopez v. Williams, 372 F.Supp. 1279, 1302-03 (E.D. Ohio 1973), aff'd sub nom., Goss v. Lopez, 419 U.S. 565 (1975); Esteban v. Central Missouri State Col., 415 F.2d 1077, 1089 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970) (also rejecting arguments that the rule was unconstitutionally vague); Banks v. Board of Public Instr. of Dade County, 314 F.Supp. 285 (S.D. Fla. 1970) (three judge court) (same), aff'd per curiam, 450 F.2d 1103 (5th Cir.), vacated for technical reasons, 401 U.S. 988 (1971). These cases preceded, and seem to be overruled by Grayned v. Rockford, 408 U.S. 104 (1972). In Grayned government witnesses testified that, id. at 105:

> demonstrators repeatedly cheered, chanted, baited policement, and made other noise that was audible in the school; that hundreds of students were distracted from their school activities and lined the classroom windows to watch the demonstration; that some demonstrators successfully yelled to their friends to leave the school building and join the demonstration; that uncontrolled latenesses after period changes in the school were far greater than usual . . . .

Defendants contested this testimony, but were found guilty of violating both an anti-picketing and an anti-noise ordinance. The Grayned court struck down the anti-picketing ordinance for vagueness, for reasons identical to those given for striking down overbroad laws, id. at 109:

> Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden area were clearly marked."

It then rejected the challenge to the anti-noise ordinance, but in so doing it observed that, id at 114:

> Although appellant does not claim that, as applied to him, the anti-noise ordinance has punished protected expressive activity, he claims that the ordinance is overbroad on its face. Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge.

Grayned illustrates the rule that plaintiffs need not establish that they were engaged exclusively in protected activity in order to be eligible to challenge the statute cited against them and that the school environment makes no exception to this rule.

THE UNWRITTEN RULE

Usually the challenged regulation is in writing, but the overbreadth doctrine should apply to unwritten rules as well. In Cantwell v. Connecticut, a defendant in a criminal case -- a Jehovah's Witness who had been playing a phonograph containing religious material on the street, was convicted, among other counts, on a charge of common law breach of peace. The Court indicated that it would give weight to a clearly defined legislative policy in such a case, 310 U.S. 296, 308 (1940), but:

> Here, however, the judgment is based on a common law concept of the most general and undefined nature. . . .
>
> The offense known as breach of peace embraces a great variety of conduct destroying or menacing public order and tranquility. . . . When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communications of views . . . . Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.

The absence of any relevant rule was noted, and actions taken pursuant to general disciplinary authority were voided in Sullivan v. Houston Ind. Sch. Dist., 307 F.Supp. 1328 (S.D. Tex. 1969), supplementary injunction ordered at request of different plaintiffs in 333 F.Supp. 1149 (S.D. Tex. 1971) and rev'd in 475 F.2d 1071 (5th Cir. 1973) (while informally approving 333 F.Supp. 1149), and Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969). In these cases the courts followed the Cantwell reasoning. As the court in Brooks observed, 412 F.2d at 1172:

> [I]t . . . is clear under the prior restraint doctrine that the right of the faculty and students to hear a speaker . . . cannot be left to the discretion of the university president on a pick and choose basis.

The unwritten code has been permitted in some cases, but none of these were cases where freedom of expression was a primary element, e.g. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) (male hair length); Zanders v. Louisiana St. Bd. of Educ., 281 F.Supp. 747 (W.D. La. 1968). One literature case (ultimately finding in favor of the student) in dictum approved the "unwritten" rule, Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 808 n.4 (2d Cir. 1971):

> This holding is in accord with the sensible observation in Richards v. Thurston . . . that the Constitution does not condition the exercise of power to prevent disruption of public schools upon the pre-existence of a rule specifically authorizing the particular action taken.

This dictum, if it is to be applied to free expression, is contrary to all of the cases discussed above which require particular, narrow and carefully drawn regulations where the regulation touches upon conduct mixed with speech. See also Section III (D) (2), infra.

DRAFTING LEGALLY ACCEPTABLE RULES

Sometimes the drafters of regulations have resorted to wholesale borrowing of judicial language. The context of a key phrase in a judicial determination is quite different from a live school context, however, and this approach does not necessarily immunize the regulation. For example, in *Nitzberg v. Parks*, Civil No. 74-1839 (4th Cir., Apr. 14, 1975) the court found that a rule which borrowed verbatim from *Tinker* was nonetheless too uncertain to pass constitutional muster. In *Jacobs v. Board of Sch. Comm'rs*, 490 F.2d 601, 605 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975), the court held to the same effect:

> It does not at all follow that the phrasing of a constitutional standard by which to decide whether a regulation infringes upon rights protected by the first amendment is sufficiently specific in a regulation to convey notice to students or people in general of what is prohibited.

This obviously is not true where the court language has become highly precise and narrow, and phrased technically with statutory language in mind. For example, the law at issue in *Ginsberg v. New York*, 390 U.S. 629 (1968) was construed to be "virtually identical to the Supreme Court's most recent statement on the elements of obscenity." *Id*. at 643. It was upheld against a challenge of overbreadth and vagueness.

Some drafter may attempt to save an otherwise overly broad rule by inserting a general exception for free expression. This was attempted in *Rasche v. Board of Trustees of Univ. of Ill.*, 353 F.Supp. 973 (D.Ill. 1972) (three judge court). The disciplinary statute at issue specifically excluded "verbal expressions" from its reach. The court, citing *Tinker*, quickly pointed out that non-verbal expression should also be protected and the savings clause was not broad enough. *Id*. at 977. The insertion of the phrase "using means which are not protected by the constitution" also failed to save a ban on "disorderly disturbance." *Undergraduate Student Ass'n. v. Peltason*, 367 F.Supp. 1055, 1057 (N.D. Ill. 1973), where the court observed:

> The attempted restriction of . . . [the statute]'s broad language simply recognizes the boundary of the state's power to regulate, but fails to give students contemplating participation in a demonstration any greater guidance as to what is prohibited; instead, it presents them with a question of constitutional law.

The best solution may be to limit the law or regulation to non-expressive conduct: blocking hallways or doors, loud noise during class sessions or in the library, property damage, and the like. If words must be limited, clearly defined and narrow definitions of the material should be used, and they must be confined to three kinds of words not protected by the Constitution, *e.g*. obscenity, "fighting words", and defamation.

NARROWING JUDICIAL CONSTRUCTION AND DEFERENCE TO STATE COURTS ON STATE LAWS

Where the challenged rule has been promulgated by the federal Congress, the federal court first has a duty to construe it narrowly, if possible, and save it from invalidity. Where the challenged rule emanates from a state legislature, the federal courts are not qualified to construe the law narrowly and must accept it as it is, or as authoritatively construed by the appropriate state court. Gooding v. Wilson, 405 U.S. 518, 520 (1972) (non-school abusive language case); United States v. 37 Photographs, 402 U.S. 363, 369 (1971) (non-school obscenity case); Cintron v. State Bd. of Educ., 384 F.Supp. 674 (D.P.R. 1974) (school case). Of course, some statutes circumscribing speech are so vague or overbroad that they are beyond repair, e.g., Near v. Minnesota, 283 U.S. 697 (1931); Cintron v. State Bd. of Educ., supra. If a state statute is susceptable to a narrowing construction, it is possible that the reviewing federal court will abstain, pending a decision by the appropriate state court in order to give them an opportunity to save the law. However, in such cases, the federal court should grant temporary relief and retain jurisdiction pending the state adjudication. See, e.g. Harrison v. NAACP, 360 U.S. 167, 176-79 (1959). Abstention is not required where the plaintiffs request only declaratory relief. Zwickler v. Koota, 389 U.S. 241 (1967). Abstention is also inappropriate where the state court has had an opportunity to narrow the regulation and failed to do so, or has clearly indicated that it will not do so. Marin v. Univ. of Puerto Rico, 346 F.Supp. 470, 479 (D.P.R. 1972) (preliminary relief). Generally, in these cases, it is possible to argue that the statutes are not capable of narrowing construction and that they are "justifiably attacked on their face as abridging free expression . . . ." Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965). See also, e.g. Keyishian v. Board of Regents, 385 U.S. 589 (1967); Corp. of Haverford Col. v. Reeher, 329 F.Supp. 1196, 1200 (E.D. Pa. 1971) (three judge court).

For special rules developed where the plaintiff seeks an injunction against a state court criminal prosecution see Younger v. Harris, Jr., 401 U.S. 37 (1971); Dombrowski v. Pfister, 380 U.S. 479 (1965); Hicks v. Miranda, 95 S.Ct. 2281 (1975). Since an injunction against state court proceedings represents a substantial federal intervention in state affairs, it can be argued that in other circumstances, the rules outlined here should be less rigorous.

P.M. Lines
Center for Law and Education
July 25, 1975

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III(B) Right to Privacy

This section will explore two aspects of what can be characterized as a student's right to privacy. The first part is an article by William E. Buss dealing with a student's "reasonable expectation of privacy" with respect to his person, school locker, and dormitory room. It explores the extent to which school officials' actions are subject to fourth and fourteenth amendment constraints. The second part of this section deals with the confidentiality of school records. It includes an analysis of the case law on the subject as well as an explanation of the recently enacted Family Educational Rights and Privacy Act, known as the "Buckley Amendment." The importance of the Buckley Amendment cannot be overemphasized, but the federal regulations which will implement it have not been finalized as this handbook goes to press and the discussion which follows is necessarily incomplete. (An analysis of the new regulations will be forthcoming soon in another Center publication.)

It should be noted that several subjects which are often grouped under a "privacy penumbra" are discussed elsewhere in the handbook. Grooming and length of hair cases appear in the section on substantive due process, Section III(D) at pp. 205, *infra*. This section also discusses school requirements that students live on campus in dormitories. Issues involving marriage, pregnancy, and parenthood are discussed in the section on *Inherent Limits on School System Authority*, Section II, at p. 7, *supra* and the section on *Equal Protection* Section III(C)(4) at pp. 173-77, *infra*. In addition, there is a discussion of the right to be left alone -- and free of police undercover surveillance -- in the note on *Freedom of Religion and Conscience*, Part III(A)(1), at p. 32, *supra*, noting the California case of *White v. Davis* which found such a system of surveillance to be a *prima facie* violation of the first amendment and a state constitutional right of privacy. There is also a discussion of the right to privacy as it applies to prevent psychological testing of students (to identify potential drug users) in Part V(E), and at p. 136, *infra* (noting the case of *Merriken v. Cressman*).

This section, then, begins with a discussion of the right to privacy as it is derived from the fourth amendment, assuring that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

III(B)(1)

Searches of Students by School Officials in Public Schools

by William G. Buss

Introduction

The scene might be anywhere in the United States. A principal gets a tip (usually from a student informer) about a student marijuana user. He opens the student's locker with a pass key and goes through the pockets of the jacket hanging inside. Marijuana is found and is turned over to the police. As a result the student is processed through the juvenile justice system, where he files a motion to suppress the evidence obtained from the search. The motion is denied, the student is adjudicated a delinquent, and receives whatever "disposition" the juvenile court finds appropriate. There are variations on the theme – a vice-principal instead of the principal; a search of the student's person rather than his locker; heroin or amphetamines rather than marijuana; earlier involvement of police officers. But the basic pattern is recurrent. Is such a search permitted by the Fourth Amendment? With a few recent exceptions, the courts have said, "Yes."[1]

The Supreme Court of the United States has held that children and students are entitled to constitutional protection.[2] Although the Court has not yet decided a case involving the application of the Fourth Amendment to public school students on the merits,[3] there is no reason to assume that the Fourth Amendment is somehow different. Students should be "people," within the Fourth Amendment,[4] as they are "persons" within the Fourteenth.[5] The right to privacy protected by the Fourth Amendment does not seem less significant to students than the right to freedom of speech protected by the First Amendment or procedural due process protected by the Fourteenth.

Below the Supreme Court level, the courts have assumed or stated that students have Fourth Amendment rights. But, although a student challenge to the validity of a search has occasionally prevailed,[6] the courts have tended to interpret the student's Fourth Amendment protection rather narrowly and perhaps even hollowly.[7] The courts seem to be saying that searches carried out by the administrative officials of the school are reasonable even though they fail to comply with the conditions necessary to make them reasonable in other contexts. This raises fundamental questions – whether the school context is sufficiently unique to justify this diluted constitutional standard and, if so, what considerations of policy and principle make it so.

This article explores the evolving case law on student searches in light of the established exceptions to warrant requirements, and various circumstances that might uniquely affect school searches. An effort is made to determine to what extent the decisions on student searches accord with the general body of search and seizure law.

At least two aspects of the law of the Fourth Amendment complicate any assessment of the application of the Fourth Amendment to school searches and seizures. First, the prohibition of

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unreasonable searches — and the implicit approval of reasonable searches — suggests a fact-oriented simplicity that does not exist. Reasonableness within the meaning of the Fourth Amendment summarizes a complex combination of factual and policy judgments. In effect, the Fourth Amendment says a search is reasonable if the courts believe it should be permitted; the courts make that judgment, in the light of the particular factual circumstances, if they believe that the desirability or need for the search outweighs the invasion of privacy that results from the search. But this judgment, even though it is made with a view to particular facts, is not made on an *ad hoc* basis, from case to case. If it were, there would be no "law" of Fourth Amendment but only a right to obtain a judicial judgment. The significance of law derives from the fact that, over time (and influenced by history), general standards have been shaped to give the courts and the litigants guidance in determining where the balance lies between the governmental interest in searching and the private interest in avoiding searches. This brings us to the second complicating consideration. In general, it is well established that a search made without a warrant is unreasonable, and a warrant may be issued only on the basis of "probable cause." But a number of identifiable exceptions have arisen to the usual warrant requirement.

Established Exceptions

Probably the most common and important exception to the warrant requirement is the search incident to an arrest,[8] the scope of which has contracted and expanded at various times.[9] In addition, searches made in "hot pursuit"[10] or under "exigent circumstances"[11] are legal even though conducted without a warrant. Although potentially applicable to searches of students in public schools, these exceptions have been read narrowly and none of the cases rejecting the students' Fourth Amendment claims has purported to rely upon any established exception.

In addition to these exceptions, the unique setting in which a search is conducted has sometimes justified a relaxation of the warrant requirement in connection with searches at military or comparable installations,[12] at the national border,[13] and pursuant to certain inspections of licensed businesses.[14] In all of these instances the lowering of the Fourth Amendment barrier is partly justified by the peculiar security needs of the activity involved and partly by circumstances weakening the searched person's claim that a protected interest in privacy has been seriously injured. Although the very existence of this group of specialized situations may seem to provide a source for additional exceptions, decisions involving school searches have not purported to find persuasive analogues in these situations.[15] Furthermore, the comparison does not seem particularly close. For example, the justification of stringent discipline for a soldier on military duty or the unique demands for security at the national border do not seem applicable to students and public schools. Nor is there much to recommend placing a child compelled to attend public school in the same category as a licensee engaged in an inherently dangerous or harmful business such as the sale of liquor or firearms.

Administrative Searches

Although the cases have drawn a distinction between searches by school officials and searches by police officers,[16] it is clear that there is no general exception from the Fourth Amendment in favor of administrative searches. In *Camara* v. *Municipal Court*[17] the Supreme Court held that a housing inspector attempting to enforce a housing code through a general area inspection of the physical condition of all the houses in a particular neighborhood could not undertake an inspection inside the petitioner's residence without a warrant. The Court also held, however, that a lower standard of "probable cause" should control the issuance of the warrant than would apply in the case of a search for evidence of a criminal violation. To the Court, a more exacting standard would greatly encumber achievement of the important public interest in carrying out a housing inspection program. Moreover, such an inspection is "neither personal in nature nor aimed at the discovery of evidence of crime" and thus involves a "relatively limited invasion" of privacy. For these reasons it was held that probable cause would be established "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."

It is important to stress the dual aspects of the case. First, the Fourth Amendment does apply to administrative searches and prohibits such searches if made without a warrant. Second, because of factors peculiar to general area housing inspections, a relaxed standard of probable cause applies for the purpose of issuing the required search warrant. These two aspects leave a hiatus from which a third inference might be drawn: when the special factors are absent, not only must the administrative search be made under the authority of a warrant, but the issuance of the warrant is appropriate only when the ordinary probable cause standards, rather than the relaxed standards of *Camara*, are satisfied.

Despite *Camara* (and usually in seeming ignorance of it), the courts have stressed the non-criminal nature or purpose of searches by school officials. Of course one can imagine innocuous searches of school lockers—say, for the purpose of sanitation or cleanliness when no sanction against the student whose locker is searched is possible. But these are not the searches that have been judged to be reasonable in the litigated cases. In these cases, in marked contrast to *Camara*, the inspection by the educational administrator has been "personal in nature" and is usually "aimed at the discovery of evidence of crime."

The law enforcement character of the search may seem most obvious when the educator and the police officer act jointly, but the search clearly has this same character when it is made by the educator at the request of the police, or even when the educator undertakes the search on his own initiative with the intention of turning over any incriminating evidence to law enforcement officials. Without the limitations that a warrant might impose, the invasion of a student's privacy resulting from the search would likely be as relentless in every respect as if the student were merely a suspected criminal whose house or room or locker was being searched by the police. In short, when the sole purpose of the search is to find evidence of a crime, the school administrator is a law enforcement officer, whatever his formal title.

Furthermore, the respective roles and purposes of police and school officials are difficult to pin down. Arrangements are likely to be tacit, informal, even subconscious. In many instances school officials will not have thought through the sequence of events that will follow their investigations and discovery of evidence, even though they have had previous police contacts and even though they are partly motivated by their sense of public duty in helping the police. In fact, it is likely that there will be no clear line between the school official's desire to help the police and the desire to make the educational environment safe for students. Indeed, no such distinction may be possible.

Even on the assumption that the school administrator does not intend to find evidence of criminal conduct, criminal prosecution is likely if a search is conducted and evidence of a criminal violation is found. The student will certainly assume that the school official will turn any evidence over to the police, and the educator is likely to feel duty-bound to do just that. It would seem artificial to characterize such a search as "administrative" (in contrast to "criminal"), and then to contend that the related criminal charge and the inevitable use of evidence for criminal prosecution should be treated as an afterthought.

The searches in the reported cases are prompted by circumstances, such as the use of drugs, that are likely to be recurrent and consequently are likely to encourage education officials and the police to combine and coordinate their efforts in dealing with these situations. Examples of such joint operations have been documented at both the high school[18] and college[19] levels, and the cases commonly reveal various types of police involvement in, or cooperation with, investigations by school officials.[20] If the identity of the searcher and the purpose of the search are given great importance, education officials are likely to be encouraged to undertake searches instead of referring such matters to the police. Of course, if the educators openly act on behalf of the police, there is strong precedent for arguing that the search should be regarded as done by law enforcement officers for law enforcement purposes.[21]

This situation presents a constant temptation to conceal the cooperative acts of police involvement that might invalidate a search by educational administrators. School officials are likely to be distracted from their primary education functions and subjected to very severe pressure to do what they feel is illegal, improper, or distasteful. Moreover, any increase in the law enforcement character of the jobs of school administrators is likely to have a damaging effect on their relationships with students. Education is not likely to thrive in an atmosphere of suspicion and distrust, or where schools have become a dragnet for crime detection and such unseemly practices as use of student informers are employed.[22] Obviously, any tendency to encourage covert arrangements between police and education officials undermines the integrity of the system of justice and reduces the respect for law by the general public, and particularly by students.

Private Action and Parental Authority

In some of the cases, the courts have carried the criminal-civil distinction to the point of absurdity by upholding school official searches as acts of private citizens or under *in loco parentis* authority, or both. In its worst form, the judicial reasoning underlying this rationale is transparently wrong. In *In re C*,[23] two vice-principals requested that a student empty a bulging pocket. When the student refused, a police officer from the juvenile division was called in, requested by the vice-principals to make the search, and proceeded to do so. The court indicated that the police officer was not acting in a police capacity but was acting as the agent of the vice-principals who were, the court said, acting in their "private" capacity. In *People* v. *Stewart*,[24] the court explained this freedom of school officials to act as private persons on the ground that the Fourth Amendment was not intended as a restraint "upon other than governmental agencies."[25] For this proposition, the court found support in the Supreme Court's decision in *Burdeau* v. *McDowell*.[26] *Burdeau* does state that the Fourth Amendment affects only "governmental agencies,"[27] but it provides no authority whatsoever for the Court's holding. In *Burdeau* the Court held that the Attorney General of the United States could use evidence illegally obtained by a *private person* —that is, *really* a private person, one not working for government at any level in any way. Plainly, the dean of boys in *Stewart* was no less an agent of government than the policeman stationed in the school building to whom the evidence was turned over, nor less than the housing inspector who attempted to make the search in *Camara*. In *Mercer* v. *State*,[28] the court took the private action notion a step further with the conclusion that the searching principal was not acting as an arm of government because he was acting *in loco parentis.* The court's reasoning, in other words, is that because a parent would not exercise governmental power, the principal acting in the parent's place does not either. The principal's *only* source of authority is derived from the fact that the principal is the agent of the school district and the school district has authority over the student because it is the government. It is errant nonsense to characterize this governmentally derived power as *in loco parentis* and then to deny its governmental origins.

Some courts have used *in loco parentis* in a more balanced fashion as one factor influencing what was "reasonable" under the circumstances. But even cases reflecting this more restrained approach fail to provide any guidance in understanding how *in loco parentis* qualifies the Fourth Amendment rights that would otherwise exist, or what is left of the Fourth Amendment protections after the qualification. One of the things that makes *in loco parentis* such an erroneous phrase in this context is precisely the absence of a genuinely parental protective concern for the student who is threatened with the school's power. It is presumably a characteristic of the use of parental force against a child that the force is tempered by understanding and love based on a close, intimate, and permanent child-parent relationship. What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct. As such, it should be subjected to law enforcement rules.

Searches Pursuant to Regulations

Administrative searches of school lockers have also been justified on the basis of regulations authorizing the search or limiting the use of a locker. By contrast, no one claims that a student's person can be searched by school officials on the basis of a school regulation reserving the right to make such searches. Yet, a number of non-school decisions have applied the Fourth Amendment to areas not physically distinguishable in any important respect from lockers.[29] Moreover, locker searches are clearly not made legal because the school owns the locker. Since *Katz* v. *United States,*[30] the Supreme Court has consistently emphasized that "the Fourth Amendment protects people, not places."[31] The *Katz* case invalidated evidence obtained from electronic eavesdropping (regarded as a search) of a telephone booth conversation. The Court held that the Fourth Amendment privacy interest is not controlled by property concepts such as ownership of the area searched.

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[32]

It is arguable that, compared to a search of a student's clothing or body, the school has a greater need to search lockers and a locker search entails less of an intrusion into the student's privacy, but these arguments do not rely upon the existence of a regulation for their persuasiveness.

Essentially, the notion that a regulation (or contract or notice) can justify an otherwise illegal search invokes a doctrine of waiver: The student is not entitled to a school locker and, therefore, a school official may grant the use of a locker on the express condition that searches be permitted. But the syllogism simply does not hold. The government has no duty to provide public housing, but if it elects to do so it may not include a provision in its lease as landlord (or its sale agreement as seller) transferring possession or title subject to the right of law enforcement officers to search whenever they choose to do so.[33] The concept that participation in government-sponsored activities could be conditioned on the participant's waiver of constitutional rights has been generally rejected, and the waiver of constitutional rights has been explicitly rejected as a basis for conditioning attendance at public colleges or participation in college activities.[34] The inappropriateness of waivers should be even clearer for public school students who are compelled by law to attend school and who, according to *Tinker,* do not automatically "shed their constitutional rights at the schoolhouse gate."[35]

Nor should the inappropriateness of forcing a student to "waive" a constitutional right as a condition of being assigned a locker be altered by the fact that the Fourth Amendment protects only the student's "reasonable expectation of privacy." If a police chief issued a "regulation"—clearly written and widely circulated—stating that all houses in a particular area will be searched if the police chief finds it desirable to do so, the courts would surely not uphold the search even though one could plausibly argue that the owner of the searched house has no reasonable expectation of privacy from that search. As this illustration suggests, the Fourth Amendment's protection cannot be defined in terms of merely factual expectations but must be shaped by the privacy that an individual *ought* to be entitled to expect. Whether students ought to have a right to privacy in their clothing, bodies, or school lockers should be decided upon the basis of considerations more fundamental than the existence or wording of a school regulation.

Consent to Search

An authorized and voluntary consent will validate a search that would otherwise be illegal. In at least one case a student consent was partially relied upon[36] and in two cases the court upheld the power of school administrators to consent to police searches.[37] It would seem that there should be a strong presumption against the voluntariness of consents by young children.[38] The courts have been extremely reluctant to infer a consent to a search that would otherwise be unreasonable under the Fourth Amendment.[39] The Supreme Court has noted the inherent unreliability of confessions and admissions by children,[40] and has emphasized the need for extreme care in determining the validity of a waiver of both the right to remain silent and the right to counsel.[41] Although the Supreme Court has rejected the argument that *Miranda*-type warnings are a condition precedent to the voluntariness of a consent to a search,[42] the Court has stated that the failure to advise a person of his right not to consent was a relevant factor to be considered on the issue of voluntariness.[43] The student's freedom of action is severely limited by the laws and regulations that require attendance at a particular school and presence in a particular classroom or some other assigned location. During the entire school day the student's every movement is subject to control. Where "freedom of action is curtailed," the Supreme Court has observed, there are "inherently compelling pressures" that tend to "undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[44]

Whereas the voluntariness of a student's consent to search should be subject to exacting inquiry, the power of a school administrator to "consent" to police searches should be rejected entirely. Ordinarily, it would be assumed, administrators lack power to authorize such police searches if they lack the power to make the search themselves. But even if one assumes, *arguendo*, that the school official has search authority, that authority should not be transferable to the police. Yet the cases are in fact divided on this point.[44a] At least one case may be read to mean not only that school officials may consent to police searches but that, when asked by the police, they *must* do so.[45] The only possible basis for permitting administrative searches where police searches would be barred by the Fourth Amendment is the assumption that the administrative search is different; thus, it should not provide a toehold for bootstrapping a police search authority. As the D.C. Circuit said concerning a comparable situation, "operation of a government agency and enforcement of criminal law do not amalgamate to give a right of search beyond the scope of either."[46]

The Educational Context

According to the analysis developed thus far, the laxity that appears to characterize the courts' application of the Fourth Amendment to searches by school officials cannot be explained on the basis of the conventional or established exceptions to the warrant requirement, by the fact that the searches are "administrative" actions rather than law enforcement, by the fact that school officials exercise *in loco parentis* authority, or by the existence of search-authorizing regulations. Moreover, consents have not been generally relied upon, and student consents are highly suspect. Yet, a theme running through the cases that uphold student searches is the proposition that the school setting is distinctive. The idea appears to be that, because of the unique character of a school as an educational institution and as a gathering place for children, a special relationship is created between students and school authorities. This relationship, in turn, demands the adoption of special rules to govern the legality of searches of students and their lockers. Pursuant to these special rules, the argument runs, school authorities must have special powers to make searches because they have a special responsibility to provide for the safety and welfare of the student.

In view of the legal requirements (and the practical need for an education) that compel school attendance, concern for student welfare seems entirely justified. By reason of legal, social and economic pressures, very large numbers of students are brought into close proximity with one another. Because this coming together is not altogether voluntary, it is especially important that students not be victimized by conditions prevailing at their educational institutions. Furthermore, the purpose of bringing students together is to enable them to engage in academic activity, and this purpose might be frustrated by their exposure to dangers or distractions.

But recognizing an important school interest in preventing harm to and the distraction of students is the beginning, not the end, of analysis. Assuming that the dangers from which students in public school might be protected are real and substantial, it is not so obvious as it may at first appear that their exposure and vulnerability create a greater need for indulging the law enforcement interest than does the enforcement of the criminal law in society at large. In this respect it is noteworthy that, however unconvincing their reasons for adopting a permissive attitude toward school administrator searches, the courts are clearly employing a special Fourth Amendment test for school personnel and not for police officers. If the justification for these searches depended solely upon the danger to other students, the school administrator-police officer distinction would be illogical. If the school-student relationship is critical, additional considerations must be involved. For example, the court might be assuming that the invasion of privacy that would result from an administrative search would be less intrusive or less frequent than that which could be expected from a police search. But the courts dealing with school searches have not articulated this idea, and the reasons already discussed in connection with administrative searches make such a distinction dubious.

Reasonable Suspicion and Student Privacy

Several courts dealing with student searches have expressly articulated a reduced standard of "reasonable suspicion,"[47] but it is not clear what this standard really means. The courts have never carefully analyzed the connection between the school's needs to protect students and the educational atmosphere, on the one hand, and the Fourth Amendment standards which the courts have applied, on the other. The failure to discuss in detail how the standard of "reasonable suspicion" is controlled to protect the student's privacy interest reflects a more general failure to

Photo by Deborah Feingold

consider seriously the interest of the student who is charged with wrongdoing or the interest in privacy that he champions in his own self-interest.[48] Yet the student in public school has a strong interest in privacy. In large measure the student shares with people generally a fundamental interest in being secure from offensive or harmful invasions of his/her private life and physical security. But this interest is also uniquely strong because personal freedom and privacy of students in public school are already restricted by compulsory attendance laws and the resulting structure and regulation of in-school life. Similarly, apart from the integrity of the student's own body, the school locker is one of the student's few harbors of privacy within the school. It is the only place where a student may be able to store what he or she seeks to preserve as private—letters from a girl friend or boy friend, applications for a job, poetry being written, books that may be ridiculed because they are too simple or too advanced, or dancing shoes the student may be embarrassed to own.

Even though the constitutional protection includes security against unreasonable searches or seizures of "persons, houses, papers, and effects," distinctions of degree have been made between the relative seriousness of different types of searches.[49] Accordingly, a search of a student's person would raise more severe Fourth Amendment questions than a search of a student's locker.[50] Furthermore, most of the reported cases that have approved searches of the student's person have involved relatively mild intrusions. A search that entails asking a student to empty his pockets—even if the student's compliance is not meaningfully consensual—entails a less hostile or offensive invasion than a more physical search—whether a mere "pat down," a search inside clothing, a strip search, or the ultimate humiliation of a body cavity search. Nevertheless, there is not much doubt that the personal indignity of a pockets-emptying search is real and serious. Nor, in many instances, was there any doubt that the threat of a more serious search was present in the event of the failure of the student to comply.[51] In any event, the courts have thus far given no indication that their decisions are restricted to the limited nature of the search actually involved and some of them may be read to indicate that no such limit is intended.[52]

"Reasonable suspicion" appears to be used by the courts to require something less than "probable cause," but how much less is difficult to ascertain. More significant than this reduced probable cause standard, however, is the approval in these cases of searches made without warrants. The courts have generally failed to offer any explanation as to why the presumption in favor of warrants is inapplicable. No doubt the answer of a school official would stress the impracticality of the warrant requirement. It could create very awkward choices: the school official could (1) make the search illegally without a warrant; (2) call in the police and "escalate" the situation; or (3) look the other way and condone the suspected misconduct. Of course the first choice cannot be justified—and, if the law were clear, it would not be. The third choice would surely happen to some extent, although there would be pressures operating to prevent it. The second choice seems the preferred one because it requires the hard question to be asked and answered: is the suspected misconduct really of the nature that justifies serious governmental intervention and eventual criminal prosecution? If the answer is "no", the administrator has no business making the search alone because he/she well knows (or should know) that any evidence of criminal conduct will in fact be turned over to the police. If the answer is "yes", the police are better able to handle the situation. Arguably there is a fourth alternative: school officials could make the search for school purposes and refuse to turn over any evidence of crime to law enforcement agencies. Even assuming that such evidence could legally be withheld, it is extremely doubtful that school officials would find it possible to resist the pressure to cooperate in a criminal prosecution. In any event, if it is thought that administrative searches by the school officials have advantages over police searches, they should be expressly authorized by appropriate statutory mechanisms. A justification for permitting warrantless searches was offered by the court in *In re G.*,[53] in which the dean of students, acting on the information provided by a student informer, "asked" the student defendant to accompany him to the dean's office and there to empty the contents of his pockets. If a warrant had been obtained (or a formal arrest made), the court said,

> . . . little imagination is needed to visualize the adverse effect of such full blown criminal procedures on the student and on the school's discipline generally.
>
> . . . Without the intervention of law enforcement officers and with little or no disruption of school activities or discipline, they conducted an informal investigation of the reported matter. Their information may or may not have proved to be valid, but their action insured that the adverse effect on the student's well-being, on his present and future emotional reaction to the event, as well as on the several societal interests concerned, would be kept at a minimum.[54]

Insofar as the court is here concerned with administrative convenience, that is not a very weighty matter and is not unique to school officials—obtaining a warrant is always a nuisance for the law enforcement officer. Moreover, if the court is hinting that young people are different, that idea—that young people will be better served by entrusting their freedom to the well-motivated actions of their adult superiors than by asserting rights afforded adult members of society—would now seem to be thoroughly discredited by *Gault* and *Tinker* and *Lopez*. If the court is talking about the disruption occasioned by introducing law enforcement measures into public schools, that is a more serious concern. But the school does not have a legitimate interest in protecting its educational program at the expense of sacrificing student constitutional rights. Moreover, it is not necessary for police officers to arrive at school in marked squad cars with sirens blaring and red lights flashing.

The main emphasis of the passage quoted from the *In re G.* case is the impact of the warrant procedure on the searched student himself. The court's reasoning is that students are better off if warrants are eschewed because the student suspect might turn out to be innocent and then the whole matter would be more easily forgotten as a passing incident rather than as the serious event signaled by presentation of a warrant. The court argues, in effect, that the student's interests receive less rather than more protection if a warrant is required. That sort of self-serving assertion must always be greeted with profound suspicion. The court's argument implicitly assumes either that the school's and the student's interests are never in conflict or that, if there were a conflict, the school officials would act in the student's interest rather than the school's. There is no reason to believe either assumption to be correct. At the very least, the student himself should be given the opportunity, through the device of a truly voluntary consent, to decide whether a warrantless search is in his own interest.

There are, in any event, several major difficulties with the court's approach. First, if the court's argument is sound, it would seem to apply to all persons suspected of crime, not just to those who happen to be students in school. Second, being searched for evidence of a criminal violation is a serious matter that cannot and should not be lightly regarded by anyone concerned. Third, it is doubtful whether being searched with a warrant will ordinarily have a greater impact on the subject than being searched without one. It is true, of course, that the student will be more familiar with the school personnel and may find them less frightening. On the other hand, a warrantless search seems more likely to convey the impression that the searched individual—young or old—is helpless before the arbitrary exercise of power by those officially clothed with society's authority. Fourth, it seems clear that a green light to warrantless searches would stimulate searches made on weaker grounds and with greater frequency. Fifth, both those who have, and those who appear to have violated laws or regulations have an obvious interest in resisting the gathering of evidence against them.

Conclusion

The court's opinion *In re G.* has a powerful pragmatic appeal, but it is difficult to square with the general principles of the Fourth Amendment. It may well demonstrate how appealing short-term expedience can exact a high price in the erosion of long-term principle. The minimal weight given to the student's privacy interest in *In re G.* and other cases is probably attributable to an undue concentration on the student against whom a particular search produced evidence of prohibited conduct. But it is utterly misleading to contrast the student guilty of crime or serious misbehavior and all "other" students. All students have a stake in preserving a modicum of privacy against interference by the police, teachers, administrators, and other students. The student prosecuted is not the only student searched. Searches are conducted on the basis of suspicion, and plainly not all suspicions turn out to have been correct or to produce convictions. As the barriers against unreasonable searches go down, the privacy of all students is sacrificed. But only the person put in serious jeopardy by a search is likely to have a sufficiently strong interest to challenge the legality of the search. The effect of unreasonable searches upon all is forcefully described in the succinct conclusion of the Fifth Circuit Court of Appeals in *Piazzola* v. *Watkins:*

> The search was an unconstitutional invasion of the privacy both of these appellees and of the students in whose rooms no evidence of marijuana was found.[55]

Possibly of even greater significance, searches outside the usual Fourth Amendment bounds may directly affect all students, who learn the lesson that lofty principles may be converted into mere rhetoric when those with power find it expedient to do so.

Most of the cases have involved searches for evidence of drug possession, and in nearly all of them drugs have been found. It is understandable that courts have been reluctant to interpret legal principles in a way that might frustrate attempts by school officials to bring criminal behavior in school, particularly drug abuse, under control. But holding school officials to general Fourth Amendment standards when, for all practical purposes, they are engaged in law enforcement work would seem to create a better balance between privacy and law enforcement interests and would probably have the additional advantage of discouraging school officials from performing functions better performed by law enforcement officers.

There is a very good chance that an erosion of privacy and the destruction of human values that go with privacy is a greater long-range danger than the behavior that would be detected and deterred by student searches. It would be a valuable lesson if students learned from the school's own example that their society respects the privacy of individuals and honors the principles of the United States Constitution.

FOOTNOTES

[1] *In re W.*, 29 Cal. App. 3d 777, 782, 105 Cal. Rptr. 775, 778 (1973), *In re C.*, 26 Cal. App. 3d 320, 325, 102 Cal. Rptr, 682, 685 (1972); *In re G.*, 11 Cal. App. 3d 1193, 1199, 90 Cal. Rptr, 361, 364 (1970); *In re Donaldson*, 269 Cal. App. 2d 509, 513, 75 Cal. Rptr. 220, 223 (1969); *State* v. *Baccino*, 282 A.2d 869, 872 (Del. Super. 1971); *State* v. *Stein*, 203 Kan. 638, 640, 456 P.2d 1, 3 (1969); *cert. denied*, 397 U.S. 947 (1970); *In re G.C.*, 121 N.J. Super. 108, 115–17, 296 A.2d 102, 106-07 (1972), *People* v. *Overton*, 24 N.Y.2d 522, 526, 249 N.E.2d 366, 368, 301 N.Y.S.2d 479, 483 (1969); *People* v. *Jackson*, 65 Misc. 2d 909, 911, 319 N.Y.S.2d 731, 733–34 (App. Term 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972); *People* v. *Stewart*, 63 Misc. 2d 601, 605, 313 N.Y.S.2d 253, 257 (Crim. Ct. 1970); *Commonwealth* v. *Dingfelt*, 227 Pa. Super. 380, 323 A.2d 145 (1974); *Reasoner* v. *State*, 463 S.W.2d 55 (Tex. Civ. App. 1970) *Mercer* v. *State*, 450 S.W.2d 715, 717–18 (Tex. Civ. App. 1970); *cf. In re Boykin*, 38 Ill. 2d 617, 127 N.E. 2d 460 (1968) (police search in school at the request of the school administration). But see cases cited note 6, *infra.* The usual context in which this question is raised is as a result of motions to suppress evidence obtained from the challenged search. (See authorities cited *supra.*) But see *Potts* v. *Wright*, 357 F. Supp. 215 (E.D. Pa. 1973) (action for damages pending against, *inter alia*, school officials).

[2] See *Goss* v. *Lopez*, 95 S. Ct. 729 (1975); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1 (1967).

[3] But see *People* v. *Overton*, 393 U.S. 85 (1968) (remand to New York courts for further consideration).

[4] U.S. Constitution, amend. IV. The amendment reads: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or things to be seized.

[5] *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969).

[6] See *People* v. *Bowers*, 72 Misc. 2d 800, 803, 339 N.Y.S.2d 783, 787 (Crim. Ct. 1973); *State* v. *Mora*, 307 So. 2d 317, 324 (La. 1975); *State* v. *Walker*, 528 P.2d 113, 115 (Oreg. App. Ct. 1974) *(dictum)*; *Young* v. *State*, 132 Ga. App. 790, 209 S.E.2d 96, 98 (1974); *cf. Potts* v. *Wright*, 357 F. Supp. 205 (E.D. Pa. 1973).

[7] See cases in note 1, *supra.*

[8] See *Chimel* v. *California*, 395 U.S. 752, 762–63 (1969).

[9] Compare *Chimel* v. *California*, *supra*, note 7, with *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), and with *Robinson* v. *United States*, 444 U.S. 218 (1973).

[10] See *Warden* v. *Hayden*, 387 U.S. 294, 298–300 (1967).

[11] See *Vale* v. *Louisiana*, 399 U.S. 30, 34-35 (1970); *Schmerber* v. *California*, 384 U.S. 757, 770–71 (1966); *Carroll* v. *United States*, 267 U.S. 132, 159–62 (1925).

[12] *Biehunik* v. *Felicetta*, 441 F.2d 228, 231 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971); *United States* v. *Collins*, 349 F.2d 863, 867–68 (2d Cir. 1965), *cert. denied*, 383 U.S. 960 (1966); *United States* v. *Grisby*, 335 F.2d 652, 654 (4th Cir. 1964); *Keene* v. *Rodgers*, 316 F. Supp. 217, 220 (D. Me. 1970); *United States* v. *Coles*, 302 F. Supp. 99, 102 (D. Me. 1969); *United States* v. *Donato*, 269 F. Supp. 921, 924 (E.D. Pa.), *aff'd per curiam*, 379 F.2d 288 (3rd Cir. 1967); *United States* v. *Miller*, 261 F. Supp. 442, 449–50 (D. Del. 1966). See also *United States* v. *Crowley*, 9 F.2d 927 (N.D. Ga. 1922).

[13] See *Thomas* v. *United States*, 372 F.2d 252, 254 (5th Cir. 1967); *Valadez* v. *United States*, 358 F.2d 721, 722 (5th Cir. 1966).

[14] *United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970).

[15] But *cf. Moore* v. *Student Affairs Committee*, 284 F. Supp. 725, 730–31 (M.D. Ala. 1968).

[16] See Buss, "The Fourth Amendment and Searches of Students in Public Schools" 59 *Iowa Law Review* 739, 756–60, 779–82, 784–87 (1974).

[17] 387 U.S. 523 (1967).

[18] *Mercer* v. *State*, 450 S.W.2d 715, 721 n.3 (Tex. Civ. App. 1970) (dissenting opinion). The *Mercer* record revealed these facts about the high school principal:

> Mr Hill has a number of students (whose identities remain undisclosed) who provide 'tips' to school officials as to whom may be in possession of marijuana.
>
> Mr. Hill meets with the Austin Police Department on a weekly basis. Particularly with the Special Services Division (narcotics squad). Mr. Hill maintains lists of suspected marijuana users. In connection with maintaining such lists, Mr. Hill confers with the police agents of the Special Services Division and notifies them of students who might be using drugs.
>
> Mr. Hill considers his powers to investigate possible criminal activity to be virtually unlimited ('the same as parent'). It is the practice of Mr. Hill to conduct 'shake downs' of large groups of students when he deems it necessary.

[19] See Note, "Admissibility of Evidence Seized by Private University Officials in Violation of Fourth Amendment Standards," 56 *Cornell Law Review* 507, 513–15 (1971).

[20] See, *e.g.*, *In re C.*, 26 Cal. App. 3d 320, 325, 102 Cal. Rptr. 682, 685 (1972) (policeman acted as school officials' "agent"); *State* v. *Stein*, 203 Kan. 638, 639–40, 456 P. 2d 1, 2–3 (1969), *cert. denied*, 397 U.S. 947 (1970) (police made locker search with student's and/or administrator's "consent"), *People* v. *Jackson*, 65 Misc. 2d 909, 910, 319 N.Y.S. 2d 731, 732 (App. Div. 1971), *aff'd*, 30 N.Y. 2d 734, 284 N.E. 2d 153, 333 N.Y.S. 2d 167 (1972) (police officer stationed in school joined administrator in chasing student but not in searching student); *State* v. *Walker*, 523 P. 2d 113 (Oreg. App. Ct. 1974); *Cf. Potts* v. *Wright*, 357 F. Supp. 215, 217–18 (E.D. Pa. 1973) (search by police with possible administrative participation); *In re Boykin*, 39 Ill. 2d 617, 618, 237 N.E. 2d 460, 461 (1968) (search by police following call by administrator).

[21] See *Gambino* v. *United States*, 275 U.S. 310, 313–14 (1927) (search by state officers solely on behalf of federal prosecution); *Byars* v. *United States*, 273 U.S. 28, 32–33 (1927) (joint venture); *cf. Keene* v. *Rodgers*, 316 F. Supp. 217, 220 (D. Me. 1970); *Stapleton* v. *Superior Court*, 70 Cal. 2d 97, 101–02, 447 P. 2d 967, 969–70, 73 Cal. Rptr. 575, 577–78 (1968); Annot. 36 A.L.R. 3d 553, 590–99 (1971). But see Kamisar, Wolf and Lustig, "Ten Years Later: Illegal State Evidence in State and Federal Court," 43 *Minnesota Law Review* 1083, 1171–77 (1959).

[22] See Rotenberg and Sawyer, "Marijuana in Houston High Schools—A First Report," 6 *Houston Law Review* 759, 765–66, 778–80 (1969); note 124 *supra.*

[23] 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (1972).

[24] 63 Misc. 2d 601, 313 N.Y.S. 2d 253 (Crim. Ct. 1970).

[25] *Id.* at 604, 313 N.Y.S. 2d at 256–57 [quoting from *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921)].

[26] 256 U.S. 465 (1921). See 63 Misc. 2d at 604, 313 N.Y.S. 2d at 256–57.

[27] 256 U.S. at 475.

[28] 450 S.W. 2d 715 (Tex. Civ. App. 1970).

[29] See *Katz* v. *United States*, 389 U.S. 347 (1967) (telephone booth); *Stoner* v. *California*, 376 U.S. 483 (1964) (hotel room); *Rios* v. *United States*, 364 U.S. 253 (1960) (taxicab); *United States* v. *Blok*, 188 F. 2d 1019 (D.C. Cir. 1951) (desk).

[30] 389 U.S. 347 (1967).

[31] *Id.* at 351.

[32] *Id.* at 359.

[33] But *cf. Wyman* v. *James*, 400 U.S. 309 (1971).

[34] See *Piazzola* v. *Watkins*, 442 F. 2d 284, 289–90 (5th Cir. 1971); *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150, 157–59 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

[35] *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, (1969).

[36] *State* v. *Stein*, 203 Kan. 638, 456 P. 2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970).

[37] *People* v. *Overton*, 24 N.Y. 2d 522, 249 N.E. 2d 366, 301 N.Y.S. 2d 479 (1969); *State* v. *Stein*, 203 Kan. 638, 456 P. 2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970).

[38] See *In re Ct. C.*, 121 N.J. Super. 108, 114–15, 296 A. 2d 102, 106 (1972).

[39] See *Piazzola* v. *Watkins*, 442 F. 2d 284, 289 & n. 3 (5th Cir. 1971); *Commonwealth* v. *McCloskey*, 217 Pa. Super. 432, 435–36 & nn. 2–3, 272 A. 2d 271, 273 & nn. 2–3 (1970) and cases cited therein.

[40] *In re Gault*, 387 U.S. 1, 45–48, 52 (1967); *Gallegos* v. *Colorado*, 370 U.S. 49, 53–54 (1962).

[41] *In re Gault, supra,* note 39, at 41–42, 55.

[42] See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 232–34 (1973).

[43] *Id.* at 248–49.

[44] *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966).

[44a] See Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 *Iowa Law Review*, 739, 779–82 (1974).

[45] *People* v. *Overton*, 24 N.Y. 2d 522, 249 N. E. 2d 366, 301 N.Y.S. 2d 479 (1969).

[46] *United States* v. *Blok*, 188 F. 2d 1019, 1021 (D.C. Cir. 1951).

[47] See *People* v. *D.*, 34 N.Y. 2d 483, 358 N.Y.S. 2d 403, 315 N.E. 2d 466 (1974); *State* v. *Baccino*, 282 A. 2d 869, 872 (Del. Super. 1971); *In re G.C.*, 121 N.J. Super. 108, 117, 296 A. 2d 102, 107 (1972); *People* v. *Jackson*, 65 Misc. 2d 909, 912, 319 N.Y.S. 2d 731, 735 (App. Term 1971), *aff'd*, 30 N.Y. 2d 733, 284 N.E. 2d 153, 333 N.Y.S. 2d 167 (1972); *Moore* v. *Student Affairs Comm.*, 284 F. Supp. 725, 728 (M.D. Ala. 1968) (reasonable belief that college room was being used in a way that would seriously interfere with campus discipline); *Waters* v. *United States*, 311 A. 2d 835, 837 (District of Columbia Court of Appeals 1973).

[48] But see *People* v. *D., supra*, note 47, in which the court, though accepting the "reasonable suspicion" approach, held a search unreasonable and articulated the possible psychological harm that could result from searches of students by school officials.

[49] See *Terry* v. *Ohio*, 392 U.S. 1, 16–27 (1968).

[50] See *People* v. *Jackson*, 65 Misc. 2d 909, 916, 319 N.Y.S. 2d 731, 738 (App. Div. 1971) (dissenting opinion).

[51] See *In re C.*, 26 Cal. App. 3d 320, 323, 102 Cal. Rptr. 682, 684 (1972); *cf. In re G.C.*, 121 N.J. Super 108, 111, 296 A. 2d 102, 104 (1972).

[52] See *People* v. *D.*, 34 N.Y. 2d 483, 358 N.Y.S. 2d 403, 315 N.E. 2d 466 (1974) (strip search approved *in dictum*); *People* v. *Jackson*, 65 Misc. 2d 909, 319 N.Y.S. 2d 731 (App. Div. 1971), *aff'd*, 30 N.Y. 2d 733, 284 N.E. 2d 153, 333 N.Y.S. 2d 167 (1972) (fist forcibly pulled from pocket and opened).

[53] 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970).

[54] *Id.* at 1197, 90 Cal. Rptr. at 363.

[55] 442 F. 2d 284, 290 (5th Cir. 1971).

III(B)(2) Recent Case Notes

Note: Since the preceding article was published a decision was reached in Smyth v. Lubbers, 398 F.Supp. 777 (W.D. Mich. 1975) (Clearinghouse Review No. 13,702), an action brought by five college students challenging the validity of college regulations that provided for warrantless dormitory room searches in the absence of either probable cause or consent by the occupants. The court held with respect to the searches that "the College is unjustifiably claiming extraordinary powers. . . . [It] contends that its interests are so important that it may use means of enforcement -- warrantless police searches on less than probable cause -- which are not available to either the federal or state governments." This contention must be rejected. In addition the court rejected the contention that the search could be justified under the "administrative search" doctrine, distinguishing Wyman v. James, 400 U.S. 309 (1971) which authorized the cutting off of A.F.D.C. benefits for the refusal by a beneficiary to permit a home visit, on the ground that Wyman involved a pre-announced, daytime search, which was not forced or compelled. The Court stated "the instant case is vastly different from Wyman." The entire opinion is worth a careful reading.

There was also a decision in Young v. State, 209 S.E.2d 96 (Ga. Ct. App., 1975) involving an appeal of a conviction of a student for possession of less than an ounce of marijuana. The marijuana was discovered when an assistant principal ordered the student to empty his pockets. The court held that (1) In view of the provisions of Georgia law, a school principal or teacher when acting in the course of his employment is a governmental agent for purposes of the fourth and fourteenth amendments. (2) A school official when acting in the course of his employment has no greater rights than an ordinary policeman would have in searching a student in his charge. A student does not "leave his fourth amendment rights at the school house door," citing Tinker. (3) There was no probable cause for the search.

State v. Mora, 307 So.2d 317 (La. 1975), a case finding an illegal search of a student's canvas bag, was remanded by the U.S. Supreme Court to the state supreme court "to consider whether its judgment is based upon federal or state constitutional grounds, or both. . . ." 44 U.S.L.W. 3199 (Oct. 7, 1975). See ED. L. BULL. No. 4 at 111 for additional discussion.

III(B)(3) Confidentiality of Records

(Addenda to Classification Materials,
Center for Law and Education, Revised
ed., 1973)

White v. Davis, 13 Cal. 3d 757, 120 Cal. Rptr. 94, 533 P.2d 222 (Cal. Sup. Ct. 1975) declares an alleged police surveillance and data gathering operation at U.C.L.A. "a prima facie violation of the state constitutional right of privacy." The case is more fully discussed in Section III(A)(1), at p. 32, supra.

Watson v. Costanzo, Civil No. 75-959 (E.D. Pa., Apr. 30, 1975) (settled by agreement) (Clearinghouse No. 14,513).

School officials had inserted into a student's record information about an arrest, suspension and transfer. The student sought expungement of the record. Defendants, following the filing of the complaint and motion for temporary relief agreed to seal all of the plaintiff's records and to release them to colleges only at the plaintiff's attorney's consent.

Merriken v. Cressman, 364 F.Supp. 913 (E.D. Pa. 1973), holding that the school could not require a student to take a personality test designed to reveal potential drug abusers. The court said, id. at 918:

> The fact that the students are juveniles does not in anyway invalidate their right to assert their Constitutional right to privacy. This court would add that the right to privacy is on an equal or possibly more elevated pedestal than some other individual Constitutional rights and should be treated with as much deference as free speech.

This case is also discussed at p. 346, infra.

III(B)(4) The Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act, known as the Buckley Amendment, calls for the withdrawal of federal funds from any educational agency or institution which (1) fails to provide parental access to all of a student's educational records (as defined by the Act), or (2) fails to prevent dissemination of student records to third parties without written parental permission (with some exceptions). The bill was originally passed as part of the 1974 Education Amendments. Education Amendments of 1974, sec. 513, 88 Stat. 571, 20 U.S.C.A. Sec. 1232g (Supp. 1975). Following an intense lobbying effort to narrow or eliminate certain provisions, Congress revised the Act, and the revisions were signed into law on December 31, 1974. The amended law appears at pp. 140-41, infra.

The act provides for a fund cut-off to state and local educational agencies receiving federal education grants if they deny parents the right to inspect files ("education records") kept on their children. Sec. 438(a)(1), 20 U.S.C.A. 1232g(a)(1). It also provides that parents must be given a hearing to challenge the content of such files. Sec.438(a)(2), 20 U.S.C.A. 1232g(a)(2). To be eligible for federal funds schools must not release files on students, except in specified situations -- to other educational agencies with a legitimate educational function; to officials of other schools when a student is transferring; to certain federal agencies and to agencies in connection with a student's request for financial aid, sec. 438(b)(1), 20 U.S.C.A 1232g(b)(1), or when the parents authorize the release, or the information has been lawfully subpoenaed. Sec. 328(b)(2), 20 U.S.C.A 1232g(b)(2). Persons desiring access to the files must sign a written form indicating the reasons why access is desired, for purposes of informing parents of such requests. Sec. 1232g(b)(3). Upon attaining age 18, a student may exercise the rights granted to parents under this law. Sec. 438(d), 20 U.S.C.A. 1232g(d).

The Act excludes the following from the definition of "education records": (1) records of personnel which are in the sole possession of the maker and not made available to any other person; (2) records kept by the personnel of law enforcement units who do not have access to education records, when used strictly for law enforcement purposes, segregated from education records, and not made available to anyone other than law enforcement officials of the same jurisdiction; (3) records solely about employees in their employee capacity; (4) post-secondary students or students over 18, medical, psychological, or other professional records used strictly for treatment and not available to anyone not involved in such treatment. Sec. 438 (a)(4)(B). All other records directly concerning a student and maintained in any form are "education records." The Act applies to the records of past students. Sec. 438(a)(1)(A).

The Act exempts from access parents' financial statements and any confidential letters of recommendation placed in the files of past secondary students before January 1, 1975, but these records are to be used only for their specific intended purpose. Sec. 438(a)(1)(B). There are also provisions whereby a post-secondary student may voluntarily waive his or her right of access to letters of recommendation for admissions, employment or honors. Sec. 438(a)(1)(C).

The law provides that no records may be released to anyone without written specific parental consent or lawfully issued subpoena or judicial order, except (1) to other local school officials with legitimate educational interest (as determined by the grantee educational agency); (2) to officials of other schools in which the student seeks enrollment; (3) to the Comptroller General, the Secretary of HEW, and administrative heads of education agencies and state educational authorities, under certain conditions where necessary to meet federal legal requirements or audits and evaluations; (4) in connection with a student's application for or receipt of financial aid; (5) to state and local officials where specifically required by a state statute adopted prior to November 19, 1974; (6) to organizations conducting studies for educational agencies or institutions concerning predictive testing, provided that such data is not personally identifiable by persons other than representatives of the organization and is later destroyed; (7) to accrediting organizations where necessary; (8) to parents of a dependent student (in order to meet colleges' objections for students over 18); and (9) when necessary in an emergency to protect health or safety. Sec. 438(b).

The statute also exempts certain "public directory information" from the requirement that parents consent to release. Sec. 438(a)(5), (b)(1), (b)(2). Parents must, however, be given notice and opportunity to inform the school that such information should not be released without prior parental consent. Sec. 438(a)(5)(B).

Release of records to any person is conditioned upon his or her agreement not to divulge such information to a third party without written parental consent and, except for local school employees, upon an entry of such access in the student's records. Sec. 438(b)(4).

Parents are entitled to a hearing to challenge the content of records and to correct or delete any "inaccurate, misleading, or otherwise inappropriate data." They may also insert a written statement concerning the records into their child's files. Sec. 438(a)(2).

Parents must be informed of the rights accorded them by the act. Sec. 438 (e).

All rights granted to parents accrue to the student alone if he is eighteen or older or is attending a post-secondary institution, except that the parents of such a student may not be denied access to the records as third parties as long as they student is a dependent. Sec. 438(d), (b)(1)(H).

The Secretary of HEW is responsible for the enforcement of the regulations and for the establishment of an investigative office and review board to hear and decide complaints. Sec. 438(f), (g).

Proposed regulations designed by HEW to implement the Act were issued in 40 Fed. Reg. 1209 et seq. (Jan. 6, 1975) (to be codified as 45 C.F.R. sec. 99) but they have been the subject of a good deal of controversy and therefore final regulations have not yet been issued. These regulations will have a profound effect on the implementation of the Act and thus this note will merely highlight major provisions. Once the regulations have become final an article analyzing them will appear in INEQUALITY IN EDUCATION, the Center's quarterly publication.

In addition to the HEW enforcement mechanism, at least two national groups plan to monitor implementation of the new law. The Children's Defense Fund is concerned about complaints in all states (violations can be reported to Linda Lipton, 1763 R St. N.W. Washington, D.C. 20009, (202) 483-1470). Additionally, the National Committee for Citizens in Education has installed a toll-free "hotline" (800-NET-WORK) to gather national opinion on how well the Act is being enforced. Persons leaving their address at that number will receive, by mail, information on the Act and a monitoring card on which parents and students can record their experiences when they ask to see their records. The group plans to issue an oversight statement to Congress at the end of a year on the basis of its findings. Additional monitoring cards in bulk can be obtained from NCCE at Suite 410, Wilde Lake Village Green, Columbia, Md. 21044.

Buck Goldstein
Paul Weckstein
Center for Law & Education
August, 1975

"The Buckley Amendment"

The Family Educational
Rights and Privacy Act,
Section 438 of the
General Education
Provisions Act,
20 U.S.C. Sec. 12329
(1974) [as it appears in 40
Fed. Reg. 1208 et seq., Jan.
6, 1975]

Sec. 438. (a) (1) (A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (C), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(C) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be recurred [sic] as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of institutional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b) (1), the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, which are created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or para-professional acting in his professional or para-professional capacity, or assisting in that capacity, and which are created, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment; provided, however, that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5) (A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) (1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency who have been determined by such agency or institution to have legitimate educational interests;

(B) officials of other schools or school systems in which the student seeks or, intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 408(c) of this Act), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection; and

(D) in connection with a student's applications for, or receipt of, financial aid;

(E) State and local officials or authorities to which such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1954; and

(I) subject to regulations of the Secretary in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

(2) No funds shall be made available under any applicable program to any education agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an eduction agency or (D) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4) (A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

(c) The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

III(C) Equal Protection

Part III(C) is divided into four subsections. First, there is a general note discussing the standards of review applied by courts when presented with an equal protection complaint. Second and third there are two notes on wealth and sex discriminations respectively. Finally, there is a section containing examples of other cases involving a denial of equal protection to students. The last section discusses, for example, the equal protections problems where unequal discipline is meted out to racial minorities, discrimination against married students, non-residents and so forth.

This material does not cover school racial segregation, a distinct and highly developed category of equal protection violations. Legal services lawyers who have clients with a problem involving racial segregation in the schools should contact the Center for Law and Education for materials and consultation. Part III(C) only briefly covers the equal protection violations which are discussed in the Center's CLASSIFICATION MATERIALS (revised ed., Sept. 1973) -- tracking, exclusion from school of handicapped and normal (e.g., pregnant) children and denial of an adequate education to non-English-speaking children. Lawyers representing clients with problems in these areas should also consult the CLASSIFICATION MATERIALS, and BI-LINGUAL-BICULTURAL EDUCATION: A Handbook for Attorneys and Community Workers (forthcoming).

III(C)(1) Judicial Standards for Finding a Denial of Equal Protection

THE DIFFERENT STANDARDS FOR REVIEW

The fourteenth amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Literally interpreted, this provision prohibits any unequal treatment of school children. However, the courts traditionally have allowed differential treatment of persons where it is reasonably related to a legitimate purpose contained in the law or regulation creating the differential treatment (the "reasonable relation" or "rational basis" test).[1] This test does not always apply, however. First, where a fundamental right is in jeopardy, or second, when the classification of those receiving differential treatment is "suspect," a stricter test applies. In these situations the courts will subject the classification to strict scrutiny, and will require a compelling state interest or purpose (the "compelling interest" or "higher relevance" test).[2]

In other words, depending on the nature of the interest which is threatened by the classification, the courts will apply a different standard of review. In an ordinary case -- where no important right is in jeopardy and the classification is not "suspect" -- the court applies what has been described as "restrained review." In other cases, the court applies "active review" or "strict scrutiny" and requires officials to justify their action by showing that an overriding and compelling state interest is at stake. Dunham v. Pulsifer, 312 F.Supp. 411, 416-417 (D.Vt. 1970); Note, Equal Protection, 82 HARV. L. REV. 1067 (1969). Initially, then, under the classic analysis, a court must decide whether to apply "restrained" or "active" review to the case before it. The classic analysis may be eroding at some points, however.

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[1] Cases where the Court has applied the "reasonable relation" test include, e.g., Rinaldi v. Yeager, 384 U.S. 305 (1966); Morey v. Doud, 354 U.S. 457 (1957); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Gulf, Col. & S.F.Ry. v. Ellis, 165 U.S. 150 (1897); see Tussman and Ten Broek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341, 346 (1949).

[2] Cases where the Court has required a compelling state interest include, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); Brown v. Board of Educ., 347 U.S. 483 (1954).

Prior to the formation of the Burger court, there appeared to be only these two tests, with all unequal classifications subject either to regular or strict scrutiny. It is possible that the Burger Court is now establishing intermediary degrees of scrutiny as well, having recognized that some classifications impose greater and lesser burdens. Thus, the Burger court has said that in any challenge under the equal protection clause, the reviewing court

> [must] look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.

Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

Thus, while some of the older equal protection cases went so far as to uphold state classifications if the court could identify any rational basis for the discrimination, regardless of whether the state had consciously adopted that basis, the Burger court has reformulated this test in some cases, and has required the state to demonstrate at least that the state's classifications "rationally further some legitimate, articulated purpose." San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). Although the court characterized the test used here as "traditional" and requiring only a "rational basis," it appeared in fact to be requiring a higher standard, whereby it balanced the interests of both parties.

The Court has also used a balancing approach in recent decisions dealing with the rights of illegitimate children. In Labine v. Vincent, 401 U.S. 532 (1971), the court upheld a state intestacy law barring acknowledged illegitimate children from sharing with the legitimate offspring in a father's estate. The decision seemed predicated on the number of alternate methods available to protect the illegitimate child's interest. Yet, in Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164 (1972) the Court struck down a state provision denying unacknowledged illegitimate children the right to recover under the state's workman compensation plan, finding no possible relation between the statute and the state's interest in legitimate family relations. The court did not distinguish Labine on the basis of state interest or right involved, but on the availability of alternate means of protecting the child's interest.

The existence of alternate methods available to the individual who desires the benefit prescribed by the challenged act is a crucial factor in the Court's determination of what standard to apply. Thus, in Bullock v. Carter, 405 U.S. 134 (1972) a statutory provision requiring a filing fee for all primary candidates was struck down for its exclusion of all indigents under a strict scrutiny standard. The Court found the statute must be reasonably necessary to the accomplishment of legitimate state objectives, id. at 145, with no reasonable alternative means of reaching the same goal, id. at 149. See also, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)(indigent could not be disenfranchised because of failure to pay poll tax); Douglas v. California , 372 U.S. 353 (1963) (indigent defendants could not be denied an attorney for an appeal as of right because of an inability to pay); Griffin v. Illinois, 351 U.S. 12 (1956) (indigent defendant could not be denied a trial transcript, or an adequate substitute, for his appeal because of an inability to pay.) See also Tate v. Short, 401 U.S. 395 (1971) and Williams v. Illinois, 399 U.S. 235 (1970) (indigents could not be incarcerated simply because of their inability to pay a fine).

The court has also looked into the alternatives available to the government to achieve its goals. Thus in *Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972) (birth control) the court noted that the challenged statute was unnecessary as a health measure (its purported purpose) in light of the federal and state laws already regulating the distribution of harmful drugs. *Cf.*, *USDA v. Moreno*, 413 U.S. 528, 536-7 (1973) (decided on "equal protection" as embodied in the fifth amendment's due process clause) which found that the existence of other existing federal legislation designed to prevent fraud cast doubt upon the argument that an amendment to the Food Stamp Act was rationally intended to prevent the very same abuse.

The court has also used a means-end approach, finding the classification must be based on "some ground of difference having a fair and substantial relation to the object of the legislation," *Kahn v. Shevin*, 416 U.S. 351, 355 (1974), citing *Reed v. Reed*, 404 U.S. 71, 76 (1971) and *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). In *Kahn*, the court found that a state tax law granting widows, but not widowers, an annual $500 property tax exemption was reasonably designed to further the state's policy of cushioning the financial impact of the loss of the spouse on the sex for whom that loss imposes a disproportionately heavy burden. In *Reed v. Reed* the court used the same test to strike down a statutory preference for men over women as administrators of a decedent's estate. See also, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (applying *Reed*'s substantial relation means-end test to invalidate state prohibition against giving single persons contraceptives). *Cf.*, *Jimenez v. Weinberger*, 414 U.S. 628 (1974), finding that denial of social security benefits to illegitimate children of the disabled born after the onset of the disability violates the "equal protection" guarantees of the due process provision of the fifth amendment. The Court went on to find that the prevention of spurious claims was a legitimate government interest, but that the law in issue was not rationally related to that end.

See also, *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 91-133 (1974) (Marshall, J., dissenting); Gunter, *Supreme Court 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1. (1972); Note: *The Less Restrictive Alternatives, and Some Criteria*, 27 VAND. L. REV. 975, 995-1011 (1974).

THE OPPORTUNITY TO RECEIVE A MINIMALLY ADEQUATE EDUCATION IS A CONSTITUTIONALLY SIGNIFICANT INTEREST WHICH REQUIRES INTENSIFIED EQUAL PROTECTION REVIEW WHEN INFRINGED

As already noted, if the classification infringes upon a "fundamental interest" then the Supreme Court has required a showing of a compelling state interest to justify the classification. The Court has recognized a fundamental interest in the right to vote; Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966), to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942); to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), and access to the courts and judicial due process, Griffin v. Illinois, 351 U.S. 12 (1956). In these cases, the governmental action "must be closely scrutinized and carefully confined" Harper v. Virginia State Bd. of Elections, 383 U.S. at 670, and cannot be upheld on a showing of rationality alone, Kramer v. Union Free Sch. Dist., 395 U.S. at 627-8.

It would seem, at first blush, that the right to an education should be included in this list. However, the Supreme Court has taken a narrow view of what is "fundamental," limiting it to that which is explicit or implicit in the federal constitution. San Antonio Ind. Sch. Dist. v. Rodriguez. 411 U.S. 1, 33 (1973). In Rodriguez the Court sustained the Texas system of financing education through local property taxes, despite arguments that this denied children of the poor, living in less wealthy districts, equal education. One of the arguments presented to the court was that a deprivation of a fundamental right -- education -- required strict scrutiny. This argument was rejected.

Nonetheless, the Court left open a number of questions, recognizing that there has been "an abiding respect for the vital role of education in a free society." Id. at 30. Thus, the Court in Rodriguez did not decide whether, on another set of facts, students could demand equal opportunity to receive an adequate education. The Court only observed that it could not ascertain what constituted "equality" on the facts before it. Id. at 24, 25 n.60, 42. The Court also seemed to be basing its ultimate conclusion on a finding that the inequality that existed in Rodriguez was not, relatively speaking, so great that it would trigger stricter review. The Court specifically stated that, id. at n.60:

> If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people -- definable in terms of their inability to pay the prescribed sum -- who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today. After all, Texas has undertaken to do a good deal more than provide an education to those who can afford it. It has provided what it considers to be an adequate base education for all children and has attempted, though imperfectly, to ameliorate by state funding and by the local assessment program the disparities in local tax resources.

Thus a relatively greater inequality, according to Rodriguez, could trigger a stricter test.

Therefore, even if the right of a child to attend school cannot be classified as a fundamental constitutional right, it is nonetheless a right of utmost importance, and far more significant than the "rights" asserted in the equal protection cases triggering only traditional review and requiring only a rational basis for justification. E.g., Morey v. Doud, 354 U.S. 457 (1957) (the right to be free from regulations governing currency exchange operations); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) (right to be free from state tax); Gulf, C. & S.F. Ry v. Ellis, 165 U.S. 150 (1897) (right not to pay attorney's fee). See also Rinaldi v. Yeager, 384 U.S. 305 (1966) and Griffin v. Illinois, 351 U.S. 12 (1956). Both raised the question of a prisoner's right to a free transcript on appeal. However, in Griffin, the Court found an indigent prisoner would be totally deprived of his right to an appeal and, in Rinaldi, the Court, noting that the prisoner was allowed to proceed in forma pauperis, categorized the right involved as freedom from reimbursing the state for an unsuccessful appeal, and found the distinction (i.e., those who received prison sentences as opposed to fines or suspended sentences) bore no rational relation to the purpose of the reimbursement statute and disposed of the case on those grounds.

There is no comparison between the rights asserted in these "traditional review" or "rational basis" cases and the right to education. The Supreme Court has historically recognized the high significance and importance of education. Still respected cases recognize it as a "liberty" interest protected by the due process clause. In Meyer v. Nebraska, 262 U.S. 390 (1923), for example, the Court relied upon that rationale in invalidating a state law which prohibited the teaching of modern foreign languages to children below the eighth grade in public and private school. While acknowledging the imprecision of the term "liberty" the Court did conclude that it included "the right of the individual . . . to acquire useful knowledge. . . ." Id. at 399. See also Pierce v. Society of Sisters, 268 U.S. 510 (1925); Bartels v. Iowa, 262 U.S. 404 (1923). The Justices have consistently averred to that liberty interest through the intervening years, and it has repeatedly formed an underlying (spoken or unspoken) basis for decision. See e.g., Goss v. Lopez, 419 U.S. 565 (1975); Vlandis v. Kline, 412 U.S. 441 (1973); Wisconsin v. Yoder, 406 U.S. 205 (1972); Epperson v. Arkansas, 393 U.S. 97 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Illinois ex rel. McCollum vs. Board of Educ., 333 U.S. 203 (1948); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). See also Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("the State may not . . . contract the spectrum of available knowledge"). Lower federal courts have also been zealous in protecting education interests. E.g., Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1971) (educational interests are part of fourteenth amendment "liberty"); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961); Ordway v. Hargraves, 323 F.Supp. 1155, 1158 (D.Mass. 1971) ("a basic personal right"); Chandler v. South Bend Commun. Sch. Corp., Civil No. 71 S. 51 (N.D. Ind. Aug. 26, 1971)(Clearinghouse No. 5320) ("a substantial right implicit in the 'liberty' assurance of the Due Process Clause"). See also Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972)(per Clark, Retired Justice).

The equal protection clause has also figured prominently in protecting educational interests affected by segregated schooling. While the race factor is dominant as a consideration in such cases, the importance of the school settings cannot be doubted. After all, public schools formed the principle arena for the first breakthrough and for the sustained fight against the "separate-but-equal" doctrine. Brown v. Board of Educ., 347 U.S. 483 (1954). The Court's opinion in Brown, in the words of Chief Justice Warren, made explicit its reliance upon the importance of education:

> Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. *In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms*.

Brown v. Board of Education, 347 U.S. 483, 493 (1954) (emphasis added).

An adequate education also may be deemed a constitutionally significant interest as a prerequisite to the effective enjoyment and exercise of rights deemed "fundamental" by the Supreme Court. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511-12 (1969); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 601-03 (1967). Thus, it could be classified as among those "implicitly guaranteed" by the Constitution in the terms of *Rodriguez*, 411 U.S. at 33. It is difficult to imagine an ill-educated people capable of fully enjoying and exercising their first amendment rights -- to speak, to write, and to read. The societal utility of the first amendment is greatly reduced when a recognizable segment of the populace is kept ignorant. Similarly, the high values which Americans place upon a republican form of government, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964), lose much of their loftiness when voters are unable to cast their ballots with intelligence and knowledge of the candidates and issues. Justice Powell recognized in *Rodriguez* the necessity of education in order for one to effectively exercise fundamental rights, 411 U.S. at 35-36, but, also found that Texas school children were adequately educated, *id.* at 37. Because of the integral part that education plays in a democratic, technologically sophisticated society, any state which deprives from a child an adequate education should be carefully balanced against the harm to the child and society in general.

WEALTH AND SEX: TWO NEW CONTENDERS AS "SUSPECT" CLASSIFICATIONS

When state action discriminates against a "suspect" class, the strict scrutiny of the compelling interest test discussed above is again drawn into play. Historically, the only suspect class has been race. See e.g., Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (holding, that Chicanos were to be considered the categorical equivalent of Blacks for the purposes of determining if the classification was suspect); Brown v. Board of Educ., 347 U.S. 483 (1954). In Brown, the Court found that the separation of school children solely because of their race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. 484,494 (1954).

The list of potential suspect classifications is expanding. What Justice Powell has characterized as the "traditional indicia of suspectness" occur whenever a class has been

> saddled with such disabilities, [and] subjected to such a history of purposeful unequal treatment, [and] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

Justice Stewart stated in his concurring opinion in the same case that ". . . at least in some settings, . . . [classifications] based upon national origin, alienage, indigency, or illegitimacy" are also suspect classifications. Id. at 61. National origin, e.g., Takashi v. Fish and Game Comm'n., 334 U.S. 410 (1948) and alienage e.g., Graham v. Richardson 403 U.S. 365 (1971), have so been held suspect. Illegitimacy may also be a suspect classification, e.g., Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972), thus mandating the compelling state interest test which has only been passed once. See Korematsu v. United States, 323 U.S. 214 (1944) which dealt with a national emergency.

Like discrimination based on account of race, discrimination on account of sex or economic status is abhorrent to the basic principles of democracy. It can be equally humiliating; it can be equally arbitrary; and, when it concerns an impressionable child or youth, it can be equally debilitating. An economic distinction among children like a racial distinction, "generates a feeling of inferiority as to their status in the community that may effect their hearts and minds in a way unlikely ever to be undone." Brown v. Board of Educ., 347 U.S. at 494 (1954). Although difficult to compare, distinctions based on sex and poverty are inherently less susceptible to explanation than are other distinctions appearing before the Court in non-racial equal protection cases -- e.g., unsuccessful prisoner-appellants, Rinaldi v. Yeager, 384 U.S. 305 (1966), larger sized families, Dandridge v. Williams, 397 U.S. 471 (1970), or servicemen, Carrington v. Rash, 380 U.S. 89 (1965). See also Dunham v. Pulsifer, 312 F.Supp. 411 (D.Vt. 1970) (athletes and non-athletes).

WEALTH

The Court has upon occasion come close to making wealth a "suspect" classification. For example, in dictum it recognized that equal protection would be violated whenever

> The individuals or groups of individuals, who constituted the class discriminated against shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.

San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973).
On the facts of Rodriguez, the Court found "there is no basis . . . for assuming that the poorest people -- defined by reference to any level of absolute impecunity -- are concentrated in the poorest districts." Id. at 23.

There are numerous other cases where the Court has recognized poverty as an obviously invalid basis for discriminating against classes of people: "'Lines drawn on the basis of wealth and property, like those of race . . . are traditionally disfavored." Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966). "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." Griffin v. Illinois, 351 U.S. 12, 17 (1956). "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which independently render classification highly suspect and thereby demand a more exacting judicial scrutiny." McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802,807 (1969). Again, in Townsend v. Swank, 404 U.S. 282, 292 n.8 (1971), the court observed:

> . . . a classification which channels one class of people, poor people, into a particular class of low paying, low status jobs would plainly raise substantial questions under the Equal Protection Clause.

See also, Hobson v. Hansen, 269 F.Supp. 401,507-08 (D.D.C. 1967), appeal dismissed per Rule 60, 393 U.S. 801 (1968), aff'd sub nom., Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

In addition, strong arguments for making wealth "suspect" have been advanced by dissenting or concurring justices in some cases. Cf. Johnson v. New York State Ed. Dept., 409 U.S. 75,76-77 (1972) (Marshall, J., concurring). Also see Lubin v. Panish, 415 U.S. 709, 719-22 (1974) (Douglas, J., concurring).

On the other hand, wealth as a "suspect" classification equivalent to race was not recognized, although the Court had a clear opportunity to do so, in James v. Valtierra, 402 U.S. 137 (1971). The Court refused to strike down a California state constitutional provision which required that low-rent housing projects be approved by a majority vote in a referendum in the community where the project would be located. Only Justices Marshall, Brennan and Blackmun dissented on grounds that the referendum requirement violated the equal protection rights of the poor. Compare Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928) (due process case) invalidating a zoning ordinance that required community approval of a home for the aged poor, since it would not "work any injury, inconvenience or annoyance to the community, the district, or any person." There is also some adverse dictum in Dandridge v. Williams, 397 U.S. 471, 478-79,486-7 (1970) tending to indicate that the rational basis test is appropriate.

A majority of the Court seems to be worried that a virtual per se invalidation of wealth-related classification, as has happened for race discrimination, could lead to some highly undesirable judicial intervention in the state's budgetary processes. Cf. Ross v. Moffit, 417 U.S. 600 (1974) (no discretionary appeal for indigents); U.S. v. Kras, 409 U.S. 434 (1973). However, the desire to save money is no justification for the failure to provide an education:

> We recognize that a State has valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, [the state] must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.

Shapiro v. Thompson, 394 U.S. 618,633 (1969) (emphasis added).

See generally Michelman, The Supreme Court, 1968 Term-Forward: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV L. REV. 7 (1969).

SEX

Sex seems even closer to achieving the status of a suspect classification than does wealth. Four Supreme Court Justices have already shown a willingness to so classify it.

> [S]ex, like race and national origin, is an immutable characteristic determined solely by the action of birth. The imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ."

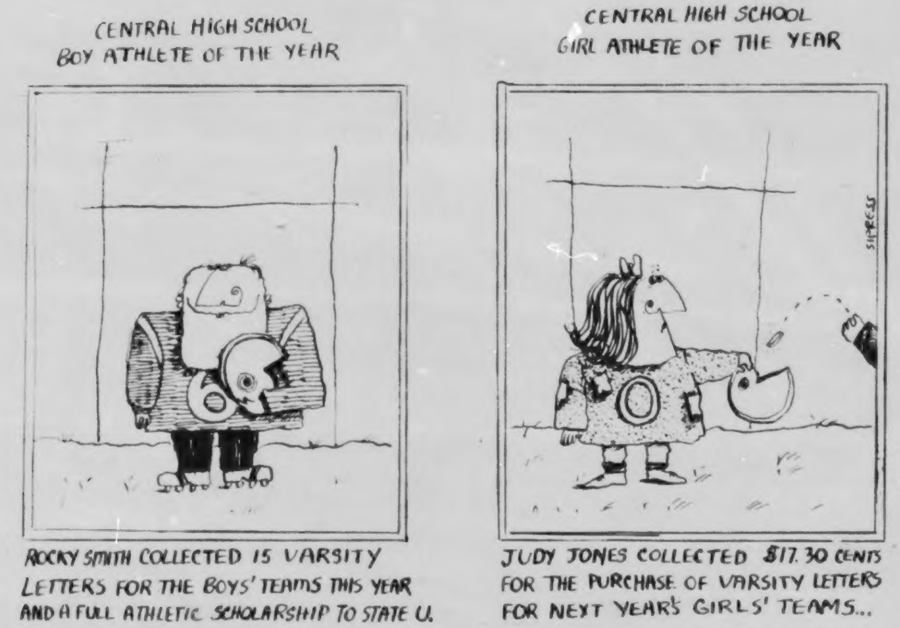
Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (striking down statute providing spouses of male members of the armed forces were dependents, but spouses of female members were not) (Douglas, Brennan, White and Marshall, JJ., plurality opinion).

The other members of the High Court prefer to defer any judicial pronouncements till the debate over the Equal Rights Amendment has ended. However, the Court has shown a willingness to strike down sexually based statutes as non-rational . See, e.g., Reed v. Reed, 404 U.S. 71 (1971) (striking down an Idaho statute which provided that between persons equally qualified to administer estates, males must be preferred to females). Also see generally, Part III(C)(3), infra.

A similar case in which a court also found no rational basis is Berkelman v. San Francisco Sch. Dist., 501 F.2d 1264 (9th Cir. 1974) (striking down higher admission standards for females on finding no evidence that an equal number of males and females furthered the goal of better education). See also Samuel v. University of Pittsburgh, 375 F.Supp. 1119 (W.D.Pa. 1974), appeal dismissed, 506 F.2d 355 (3rd Cir. 1974), in which the court ruled in favor of married female students challenging University rule which assumed that the domicile of a wife was that of her husband and charged non-resident rates where the husband was a non-resident, id. at 1133:

> This Court's inquiry in this case has been whether there is a rational governmental interest furthered by the residency rules of the defendants. This Court finds that there is -- the dual interest of administrative convenience and preservation of fiscal integrity. But the inquiry does not end with an answer to the first question. It has been asked whether certain fundamental personal rights, . . . have been infringed. Operating upon a special sensitivity to sex as a classifying factor, this Court finds that the residency rules promulgated and administered by the defendants in this case have resulted in the denial of equal protection to plaintiff class members.

It should be pointed out that where no rational basis for the discrimination exists, the court can decide on this basis without deciding whether a higher standard of review is necessary.


CENTRAL HIGH SCHOOL
BOY ATHLETE OF THE YEAR
ROCKY SMITH COLLECTED 15 VARSITY LETTERS FOR THE BOYS' TEAMS THIS YEAR AND A FULL ATHLETIC SCHOLARSHIP TO STATE U.
CENTRAL HIGH SCHOOL
GIRL ATHLETE OF THE YEAR
JUDY JONES COLLECTED $17.30 CENTS FOR THE PURCHASE OF VARSITY LETTERS FOR NEXT YEAR'S GIRLS' TEAMS...
SIPRESS

Cartoon by David Sipress

THE INTEREST OF THE STATE

The third element that the Court said it should consider when examining equal protection complaints, was the "governmental interests asserted in support of this classification." Dunn v. Blumstein, 405 U.S. 330, 335 (1972). For "suspect" classifications, there is hardly any acceptable justifications. In only one case involving a "suspect" classification has the state met the burden of justification imposed on it. Korematsu v. United States, 323 U.S. 214 (1944). It took a major war and a belief, accepted by the country and Court, that the class discriminated against remained, as a class, likely to be loyal to the enemy. Fundamental interests have been abridged more frequently, but the burden of justification remains heavy. See, for example, the general requirements for justifying any abridgement of first amendment rights. Part III (A), supra.
Moreover, where the classification is doubtful (even if not "suspect" in the traditional sense) and the interest which is affected is substantial (even if not constitutionally "fundamental") the combined considerations should work to trigger a stricter standard of review than would be pursued in an ordinary case. Thus, in Griffin v. Illinois, 351 U.S. 12 (1956) the court did not attach great weight to the right to an appeal, but it found the classification itself (poverty) so highly arbitrary that the more stringent test again seemed appropriate. See also Hargrave v. McKinney, 413 F.2d 328 (5th Cir. 1969); Serrano v. Priest, 5 Cal.3rd 584, 487 P.2d 1241, 1250-59, 96 Cal. Rpt. 601 (1971).

Another state interest which should not prevail when the facts present a highly arbitrary distinction among students -- such as sex or poverty -- and their vital interest in receiving an education is affected, is the state interest in saving funds. Cost savings was explicitly rejected in Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (emphasis added) where the court recognized that a state has legitimate interests in preserving its fiscal integrity, but where it also observed that:

> It could not . . . reduce expenditures for education by barring indigent children from its school. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.

The full quote is found at p. 152, supra.
Cost savings were also rejected, in effect, in Griffin v. Illinois, 351 U.S. 12 (1956), and all of its progeny, and in Gideon v. Wainwright, 372 U.S. 335 (1963). Other possible justifications for unequal treatment of students might be based upon a desire to save the time of teachers and other staff -- an argument that should be equalled with the cost-saving argument. In sum, the nature of the right or interest as well as the nature of the classification are considered together, as they must be, the state has only the slightest chance of justifying unequal opportunity for the poor and females when offering essential educational opportunities to others.

The classic choice of traditional or strict scrutiny, depending on whether the court finds the facts before it present an ordinary classification, or a "suspect" one or a denial of a fundamental right, appears to be giving way in two main areas. First, where the court can find that the interest affected is a significant one -- even if not a fundamental right -- the court will require more than any conceivable rational basis to justify the classification. Second, although sex and poverty have not yet been labeled by the Court as "suspect" classifications, they also require a heavier burden of justification. Each of these are discussed in greater detail below.

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III(C)(2) Classification Based on Wealth — Examples of Cases

Denying an essential right to schooling to a child because he is poor is so obviously arbitrary and unjust that it should trigger a stricter review than other classifications dealing with other interests. The Supreme Court has not yet held this directly, however, but in San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) it recognized this principle where two elements come together in a single use: (1) a definable category of poor people, and (2) a failure to provide each child with the opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process. Id. at 22-24.

Discrimination against poor children in educational opportunity may arise in a variety of contexts. First, and most obvious, the charging of special fees for books, materials, and other educational privileges could operate to keep those who are too poor to pay the fees from enjoying essential educational opportunities. The leading federal case in this field is Johnson v. New York State Ed. Dept., 449 F.2d 871 (2d Cir. 1971), vacated for mootness, 409 U.S. 75 (1972). Plaintiffs brought an action challenging the failure of the state to supply free texts in the primary grades. Although the case was mooted when voters in the respondent school district voted a tax for the provision of free texts, the concurring opinion of Justice Marshall indicated clearly how he would vote when this issue next reached the bench, id. at 76-77:

> The practical consequence of this situation was that indigent children were forced to sit "'bookless, side by side in the same classroom with more wealthy children learning with purchase[d] textbooks [thus engendering] a widespread feeling of inferiority and unfitness in poor children [which] is psychologically, emotionally, and educationally disastrous to their well being.'" . . .
>
> This case obviously raises questions of large constitutional and practical importance.

As a general rule, courts are finding fees invalid, although equal protection is not always a basis for the holding. See generally, A.C.O.R.N. v. Little Rock Sch. Dist., Civil No. LR 71-C-77 (W.D. Ark., filed Jan. 15, 1973)(Clearinghouse No. 4310); Paulson v. Minidoka Sch. Dist. No. 331, 93 Idaho 469, 463 P.2d 935 (1970)(state constitutional grounds). Vendevender v. Cassell, 208 S.E.2d 436 (W.Va. 1974)(same).

The fees issue has been addressed by the Center in STUDENT FEES (revised ed. Mar., 1972), a publication prepared before the current onslaught of school fee cases. This publication, which is now out-of-print and out-of-date, will be replaced by another manual in the future, but the date has not yet been established. Legal services lawyers advising clients who are losing educational opportunities for failure to pay fees should contact the Center for advice and materials. See also note, 41 A.L.R.3rd 752, and the materials prepared for *Carnes v. Kentucky*, (complaint is reproduced at p. 391 *infra*), Civil No. 74-33 (E.D.Ky.) available from the National Clearinghouse for Legal Services (No. 15,095) (complaint, amended complaint, memo in support of preliminary injunction, memo in opposition to motion to dismiss and memo in support of class action.)

Another type of case where wealth classifications are at least potentially a problem are the school finance cases. A distinction must be made, however, between inter- and intradistrict funding, because of the Supreme Court's willingness to accept local self-determination as a sufficient justification for inequality in funding from district to district within a state, so long as all children are guaranteed an adequate education. See *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), discussed in Part III(C)(1), *supra*. Compare with *Hobson v. Hansen*, discussed below.

Rodriguez did not preclude state courts from finding an independent state ground for invalidating unequal financing systems. Thus, less than three weeks after *Rodriguez*, the New Jersey Supreme Court declared the New Jersey system of finance unconstitutional, finding its state constitution more demanding. *Robinson v. Cahill*, 162 N.J. 473,303 A.2d 273, 282 (1973), *modified on other grounds*, 63 N.J. 196, 306 A.2d 65 (1973). The following year, a California court reaffirmed that state's constitutional standard of fiscal neutrality. *Serrano v. Priest*, Civil No. 938, 254 (Cal. Super Ct. Apr. 10, 1974) (app. pending) *on remand from* 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). Numerous cases are still pending in several state courts. (For further information on pending state cases, contact the Lawyers' Committee for Civil Rights Under the Law, 1500 K St., Washington, D.C.)

Intradistrict inequality in financing involves all of the same considerations as interdistrct inequality, except that local autonomy of school districts cannot be interjected as a justification. The leading case is *Hobson v. Hansen*, 269 F.Supp. 401 (D.D.C. 1967), *appeal dismissed per Rule 60*, 393 U.S. 801 (1968), *aff'd sub nom.*, *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). The district court, Judge Skelly Wright, found a $100 per pupil discount in elementary schools which served predominantly the black and poor, compared to those serving white and middle class students ($292 compared to $392). The court found the inequality among schools to be a conspicuous denial of equal protection, noting, *id.* at 497 (emphasis added):

> Theoretically purely irrational inequalities even between two schools in a culturally homogeneous, uniformly white suburb would raise a real constitutional question. But in cases not involving Negroes *or the poor*, courts will hesitate to enforce the separate-but-equal rule rigorously.

See also *id.* at 508.

In subsequent proceedings the court went into this problem in greater detail and ordered the district to correct the disparity between per pupil expenditures among schools, so that deviations would not exceed five percent. 327 F.Supp. 844 (D.D.C. 1971).

In *Hobson v. Hansen*, the court generally considered poor and black children in the same light, and, on the facts, they were often the same children. In another case of this type, *Brown v. Board of Educ. of Chicago*, 386 F.Supp. 110 (N.D. Ill. 1974), the judge declared a different standard of review for racial minorities and the poor. Plaintiff in a class action alleged that the Chicago Board of Education arbitrarily allocated the city's educational funds in a manner which systematically discriminated against non-Caucasian and poor children. The court found that an eight percent variance between Title I and non-Title I schools (eligibility for Title I funds serving as an indicator of low economic status), had a sufficiently rational goal, i.e., financing a teacher-assignment policy based on seniority. The court also complained that the plaintiffs failed to prove all students in the poorer schools were indigent. In contrast, the court viewed an eight percent variation in funding between Caucasian and non-Caucasian schools as sufficient to make out a prima facie case of racial discrimination which could not be justified on these same grounds. Since the court found a violation of equal protection, its views on the standard to be used for the poor could be considered dicta. Finally, it should be noted that the court denied relief, since affirmative action programs had reduced the average expenditures disparity to about one percent and the Board had pledged to continue the effort to equalize expenditures.

Another type of discrimination among students which may unduly burden children of the poor is the practice of "tracking" (permanent or semi-permanent ability groupings). This practice and its implications are fully discussed in our publication, CLASSIFICATION MATERIALS (revised ed., Sept. 1973). The tracking cases should be consulted as a general precedent for other types of wealth discrimination, for frequently poor children are found to be disproportionately assigned to lower tracks. As is true of inter-district financial disparities, these cases often turn on the fact that racial minorities were more frequently tracked low, rather than the poor.

Again, treating blacks and the poor almost as one, Judge Wright in Hobson v. Hansen also struck down the District of Columbia's "tracking" system upon finding mostly poor and black students assigned to lower tracks. The court reviewed the evidence, found numerous infirmities in the tracking system and concluded, 269 F.Supp. at 511 [emphasis added]:

> The sum result of those infirmities, when tested by the principles of equal protection and due process is to deprive the poor and a majority of the Negro students in the District of Columbia of their constitutional right to equal educational opportunities.

The court's condemnation of tracking consistently referred to the plight of both the racial minority and the poor, id. at 515:

> Even in concept the track system is undemocratic and discriminatory. Its creator admits it is designed to prepare some children for white-collar, and other children for blue-collar, jobs. Considering the tests used to determine which children should receive the blue-collar special, and which the white, the danger of children completing their education wearing the wrong collar is far too great for this democracy to tolerate. Moreover, any system of ability grouping which, through failure to include and implement the concept of compensatory education for the disadvantaged child or otherwise, fails in fact to bring the great majority of children into the mainstream of public education denies the children excluded equal educational opportunity and thus encounters the constitutional bar.
>
> As has been shown, the defendants' pupil placement policies discriminate unconstitutionally against the Negro and the poor child whether tested by the principles of separate-but-equal, de jure or de facto segregation.

Judge Wright's language provides some precedent for attacking any school system scheme which operates to deny children of the poor the same opportunities given to children of the rich.

A final potential equal protection problem revolves around withholding of assistance. Sometimes denial of financial assistance may accompany a disciplinary sanction, for example. Where an indigent student loses a scholarship, the matter is much more serious than where a student with other resources loses one, and there is a real possibility that indigent students will be incidentally excluded from school as a result. A case where plaintiffs raised this point was dismissed without specifically discussing the allegation in Romero v. Cleary, Civil No. 70-168-FW (C.D. Cal. June 30, 1970)(Clearinghouse No. 3133). Decisions for plaintiffs for other reasons (overbreadth in the rule) are discussed at Part III(A)(6), at 104-108, supra. A case pending on this question is Manwell v. Wood, Civil No. 73-4262-G (D. Mass., Filed Dec. 20, 1973)(Clearinghouse No. 17,258).

Jane S. Samuels
Center for Law and Education
August 10, 1975

III(C)(3) Sex Discrimination

The equal protection clause prohibits invidious discriminations on the basis of sex, and, as discussed above, the burden may be on the state to show that the discrimination is essential to achieve a legitimate state goal. In addition, Congress has recently enacted comprehensive legislation which prohibits sex discrimination in any federally-funded program. Title IX of the Education Amendments of 1972, Section 901(a), 20 U.S.C. 1681. Both the constitutional and the legislative rights to sexual equality are discussed here.

EQUAL PROTECTION

EXCLUSIONS

Courts have found the exclusion of one sex from a state university a violation of the equal protection clause. In Kirstein v. Rector and Visitors of Univ. of Virginia, 309 F.Supp. 184 (E.D. Va. 1970), women were excluded from the University of Virginia branch in Charlottesville, which was the most prestigious branch and provided educational opportunities unavailable at the other campuses. The Kirstein court held such exclusion deprived plaintiffs of their constitutional right to educational opportunities equal to those provided men, and therefore violated the equal protection clause. The court explicitly refrained from deciding if the provision of separate but equal educational opportunities for women and men was unconstitutional.

In contrast, however, males challenging their exclusion from a state university campus for women lost in Williams v. McNair, 316 F.Supp 134 (D.S.C. 1970), aff'd per curiam, 401 U.S. 951(1971). Here plaintiffs had the option to attend other coed or all male university branches. The court distinguished this case from Kirstein, in that male plaintiffs failed to show that the women's college enjoyed special status or provided educational opportunities unavailable elsewhere. Plaintiffs, who lived near the women's college, unsuccessfully argued that closing the college to males forced nearby males but not females to move in order to attend a state university, in violation of the fourteenth amendment. The Williams case indicates that the provision of equal, separate and mixed educational opportunities satisfies the mandates of the equal protection clauses. Whether only separate but equal education opportunities are constitutional is left unsettled by these cases. In summary, after the Kirstein and Williams cases, single sex public undergraduate institutions must open their doors to the excluded sex if certain educational opportunities are available only there.

In a recent case, a court found unconstitutional a policy barring females from an all-male academic high school, even though the school system provided an academic girl's high school with identical entrance requirements. The court ruled the policy does not bear a fair and substantial relationship to any legitimate objective and that single-sex academic schools do not provide alternatives for students wishing to attend such schools. Vorcheimer v. School District of Philadelphia, F.Supp. (E.D.Pa., Aug. 1975)

DIFFERENT ADMISSION STANDARDS

Use of quotas or different admissions standards for men and women has also been held violative of the equal protection clause. Bray v. Lee, 337 F.Supp. 934 (D.Mass. 1972) (higher test score for women to be admitted due to smaller capacity of separate women's facility); Berkelman v. San Francisco Unified Sch. Dist., 501 F.2d 1264 (9th Cir. 1974) (higher grade point admissions standard required of girls to maintain a 50-50 ratio between male and female students).

COURSE ADMISSION

The exclusion of female students from auto shop, wood shop, and metal shop classes has successfully been challenged. Della Casa v. Gaffney, Civil No. 171673 (Cal. Super. Ct., Stipulated judgment filed 4/11/73) (auto shop) (Clearinghouse No. 9,308); Seward v. Della, Civil No. 134173 (Cal. Super. Ct. 1973) (wood shop) (Clearinghouse No. 16,922); Sanchez v. Baron, Civil No. 69-C-1615 (E.D.N.Y., Jan 6, 1971) (metal shop). The usual justification for such exclusion, articulated by the high school principal in the Della Casa case, was as follows:

> It so happens that auto mechanics has been a male occupation. Whether or not we agree with this it is still predominantly a male occupation. If we open the regular school program to girls, then for each girl in the class, a boy does not have a chance to enter . . . .

Letter from Thomas J. Gaffney, dated August 24, 1972, attached as Exhibit "B" to complaint in Della Casa v. Gaffney.

ATHLETICS

Litigation challenging discrimination against female students in athletics programs has proliferated in the last five years. Suits are usually filed against state athletic associations which regulate interscholastic athletic competition. Association rules which stipulate that girls and boys may not compete on the same athletic team, or that girls and boys may not compete against each other have been successfully challenged as being violative of the equal

protection clause per se, Reed v. Nebraska Sch. Activities Ass'n, 341 F.Supp. 258 (D. Neb. 1972), or in their application, Brenden v. Independent Sch. Dist., 342 F. Supp. 1224 (D. Minn. 1972), aff'd, 477 F.2d 1292 (8th Cir. 1973); Haas v. South Bend Community Sch. Corp., 289 N.E. 2d 495 (Ind. 1972).

THE STANDARD OF REVIEW IN ATHLETIC CASES

The standard of review the courts have applied in athletics cases to determine whether an unconstitutional classification has occurred reflects the evolutionary development of standards under the equal protection clause generally. The majority of courts has adopted the standard enunciated in Reed v. Reed, 404 U.S 71, 76 (1971):

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike."

Thus, in the leading athletics case of Brenden v. Independent Sch. Dist., the court decided that it was unnecessary to determine whether sex is a suspect classification because the application of the challenged "rule cannot be justified even under the [less strict] standard applied to test nonsuspect classifications." 342 F.Supp. at 1297. See also Bucha v. Illinois High Sch. Ass'n, 351 F.Supp. 69 (N.D. Ill. 1972) (classification excluding girls from boys' swim-team rationale based on evidence of male athletic superiority); Reed v. Nebraska Sch. Activities Ass'n, 341 F.Supp. 258 (D. Neb. 1972) (state failed to show rational basis for rule prohibiting sexes from competing on the same golf team or against each other); Haas v. South Bend Community Sch. Corp., 289 N.E.2d 495 (Ind. 1972) (classification which was non-discriminatory on its face found to be discriminatory in operation because of absense of opportunities for girls).

In contrast, some courts have adopted a stricter standard of review. Following the Supreme Court's decision in Frontiero v. Richardson, 411 U.S. 677 (1973), where four members of the Court expressed the view that sex is a "suspect" classification, one court treated classification by sex as a suspect classification subject to close judicial scrutiny. In Gilpin v. Kansas State High Sch. Activities Ass'n, Inc., 377 F.Supp. 1233 (D. Kan. 1974) the court placed the burden of proof on the defendant activities association to show that its classification prohibiting sexually integrated teams bears a substantial relation to its interest in equitable competition. The court found the overbreadth of the classification to be fatal since it deprived some able female athletes the opportunity to compete.* In Darrin v. Gould, No. 43276 (Wash., Sept. 25, 1975) (Clearinghouse No. 16,595) the State Supreme Court of Washington ruled that its courts must apply strict scrutiny when reviewing sex discrimination in schools, because of the recent passage of the state's equal rights amendment (ERA). The ERA is set forth at p. 171, infra.

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*For a thorough discussion of the case law on sex discrimination, see Weckstein, Judicial Standards for Determining Sex Discrimination, 18 INEQUALITY IN EDUCATION 58 (Oct. 1974).

The success of litigation in this area is dependent on a number of interrelated factors including whether the sport involved is a contact or non-contact one, whether there is an existing girls' team (separate but equal argument), and whether the action is brought on behalf of a class or an exceptional female athlete.

CONTACT AND NON-CONTACT SPORTS

The majority of successful cases involve female students' rights to join teams for *non-contact* sports. Most of these courts have emphasized the non-contact feature of the sport in which plaintiff sought to participate. *Brenden*, 477 F.2d at 1295 (tennis and cross country skiing and track); *Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973) (preliminary injunction as to tennis); *Gilpin v. Kansas State High Sch. Activities Ass'n*, 377 F.Supp. 1233 (cross-country track); *Reed v. Nebraska Sch. Activities Ass'n*, 341 F.Supp. 258 (D. Neb. 1972) (golf); *Haas v. South Bend Community Sch. Corp.*, 289 N.E.2d 495 (Ind. 1972) (golf).

In contrast, courts are somewhat more reluctant to find boys' contact sports teams unconstitutionally exclude girls. In addition to the dicta in the above cases, there is *Fortin v. Darlington Little League, Inc.*, 376 F.Supp. 473 (D.R.I. 1973) (denying girls' request to play baseball); *Magill v. Avonworth Baseball Conference*, 364 F.Supp. 1212 (W.D. Pa. 1973), *vacated*, 497 F.2d 921 (3rd Cir. 1974) (the circuit court vacated and remanded without opinion the district court's refusal to enjoin a baseball team's exclusion of girls).

Two favorable contact sports cases have been identified, however. In *Pennsylvania v. Pennsylvania Interscholastic Atheletic Ass'n*, Pa. Commonwealth , 334 A.2d 839 (1975) the court invalidated a rule restricting girls' opportunities in sports including football and wrestling based on the equal rights amendment to the state constitution. In *Darrin v. Gould*, No. 43276 (Wash., Sept. 25, 1975) the state supreme court ruled in favor of two well-qualified girls who desired to play football; the rules of the state's athletic organization which automatically excluded girls was ruled invalid. Again, a state ERA provided the basis for the decision.

INDIVIDUAL V. CLASS ACTION

A girls' bid to play on a boys' team is more likely to succeed when the action is brought by a single, well-qualified girl, rather than on behalf of a class. *Ritacco v. Norwin Sch. Dist.*, 361 F.Supp. 930 (W.D. Pa. 1973). In *Ritacco*, the named plaintiff graduated before an opinion regarding her right to play on all non-contact teams was issued. The court held the issue moot as to the named plaintiff, and argued that the class could not stand as it was insufficiently defined. However, in another unsuccessful case, a class action was allowed based on the fact that the named plaintiffs and some members of the class had similar interests. *Bucha v. Illinois High Sch. Ass'n*, 351 F.Supp. 69 (N.D. Ill. 1972).

Also, in Brenden, 477 F.2d at 1295, the court emphasized that its decision was limited to the named plaintiffs' right to play on their schools' (non-contact) teams, and did not rule on the general access of females in other (contact) sports. In Darrin v. Gould the trial court in dictum had said that it might have ruled for the girls if they had not attempted to maintain a class action. When it reversed, the supreme court did not address itself specifically to the class action, but it clearly ruled that the state athletic association ruled "cannot be used to deny the Darrin girls, and girls like them, the right to participate" on their schools' football teams.

PRESENCE OR ABSENCE OF A GIRLS' TEAM

Where no girls' team exists, an individual, well-qualified female plaintiff's right to join an existing non-contact sports team usually succeeds. Brenden; Gilpin; Reed; Haas. In such a situation, the courts reason that the athlete is completely barred from an opportunity to participate because of the defendant's failure to provide separate teams. Implicit in such an analysis is the argument that if a girl's team existed, relief would be denied. See Gilpin, 377 F.Supp. at 500, where the court reasons that only application of a rule barring sexually integrated teams where there are no girls' teams is unconstitutional, and not the rule *per se*.

SEPARATE BUT EQUAL PROTECTION

The courts are willing to accept the concept of separate but equal programs in the area of sports for a number of reasons. Expert testimony regarding physical differences between men and women and consequent concern for safety was a rationale frequently relied upon by courts in Bucha and Fortin. At least one court has rejected this contention in a case brought under a state equal rights amendment. Pennsylvania v. Pennsylvania Interscholastic Athletic Ass'n, Pa. Commonwealth , 334 A.2d 839 (1975). See also p. 171, *infra*.

Also advanced in support of the separate but equal concept is the argument that psychological damage is the likely result of sexually integrated teams. A minority of courts have accepted evidence of psychological damage to boys caused by integration of teams as a justification for league rules. In Gregorio v. Board of Educ. of Ashbury Park, No. A-1277-70 (N.J., Apr. 5, 1971) the supreme court denied relief to a girl seeking admission to the boys' tennis team on the ground that boys who lost to girls would incur serious psychic injuries, resulting in their withdrawal from sports. See also Hollander v. Connecticut Interscholastic Athletic Conference, Civil No. 12497 (Conn., Mar. 29, 1971), where, in addition to finding potential psychological harm to boys, the state supreme court also concluded that girls did not need the "character" imparted by competitive sports.

Conversely, the district court in Brenden rejected the psychological harm argument, 342

F.Supp. at 1224, 1233. A study commissioned by the New York Department of Education[1] provides further support for the argument that neither boys nor girls will incur physical or psychological harm if allowed to compete with or against each other in a variety of non-contact sports. This study resulted in a state regulation permitting integrated teams in non-contact sports where no girls' team exists. Section 135.4 of the Regulations of the Commissioner of Education. See also Pub. Act. No. 138 (1972), Mich. Comp. L. Ann. 340.379(2), Mich. Stat. Ann. 15.3379(2) (1975) (set forth in full, *infra*, p. 172.)

Whether or not girls' teams exist, some courts are ready to justify segregated athletics with the argument that integrated teams result in male dominance and restriction of opportunities for women. In *Ritacco* the court argued that the evidence proved that girls' teams developed better when the sexes were segregated. Conversely, the court in *Brenden*, 342 F.Supp. at 1302, reasoned that this argument was too speculative to have merit, and, in any case, could not be used to deprive the plaintiffs of their right to equal protection where there were no existing opportunities for female athletes. See also *Haas v. South Bend Community Sch. Corp.*, and *Comment, Sex Discrimination in Interscholastic High School Athletics*, 25 SYRACUSE L. REV. 535 (1974), for an argument that even where an opportunity exists for female athletes, the separate but equal doctrine is flawed because in reality all females' teams receive inferior coaching and equipment and are given restricted access to facilities and financial aid. In *Pennsylvania v. Pennsylvania Interscholastic Athletic Ass'n*, brought under the Pennsylvania equal rights amendment, the court found that girls are denied opportunities to reach their athletic potentials when they are limited to playing on girls' teams, and cannot compete for places on teams composed of others of comparable athletic abilities.

OTHER ISSUES

Two other defenses frequently raised should be noted. One is that athletic programs are privileges, not rights, and therefore the fourteenth amendment is inapplicable. The courts have given short shrift to this argument. They reason that the issue is not one of rights or privileges, but rather one of denial of state-provided activities and benefits to one class and not another, *Brenden*, 342 F.Supp. at 1297, or one of differential treatment of two classes of persons. *Reed v. Nebraska Sch. Activities Ass'n*, 341 F.Supp. at 262 . In *Bucha v. Illinois High School Ass'n*, 351 F.Supp. 69, the court rejected the Association's argument that its program was a privilege, not a right, and interpreted the plaintiff's claim as an assertion of her constitutional right to equal educational *opportunity*, rather than an absolute right to participate. See also *Darrin v. Gould*, No. 43276 (Wash., Sept. 25, 1975) (Clearinghouse No. 16,595).

Defendent associations also argue that, as private entities, they are not subject to suit under 42 U.S.C. 1983. The courts have uniformly rejected this contention, finding the associations to be "sufficiently entwined with the public schools to be under color of state law, custom or usage." Reed v. Nebraska Sch. Activities Ass'n, 341 F.Supp. at 260. Evidence of such factors as school officer or faculty member representation in the association, revenue collected from member schools, the control the associations have over coaching methods and duties and their regulation of interscholastic competition makes the associations subject to judicial scrutiny. Gilpin v. Kansas State High Sch. Activities Ass'n; Fortin v. Darlington Little League; Bucha v. Illinois High Sch. Ass'n; Darrin v. Gould.

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[1] Report on Experiment: Girls or Boys' Interschool Athletic Teams, March 1969-June 1970; The University of the State of N.Y., the State Education Dept., Div. of Health, Physical Education and Recreation, Albany, N.Y., February 1972.

HEALTH SERVICES

A suit brought be female students challenging a university's failure to provide pap tests and gynecological examinations as invidious discrimination on sex, was unsuccessful, in Bond v. Virginia Polytechnic Inst. & State Univ., 381 F.Supp. 1023 (W.D. Va. 1974). The student health plan, financed primarily with student fees, provided for out-patient department visits, most medication for acute illness, some laboratory and x-ray procedures and admission to the in-patient department. No specialty services, such as the prescription of contraceptive devices or drugs, were included. Plaintiffs argued that such exclusion of gynecological care and pap tests was a violation of the equal protection clause. The court dismissed the complaint for failure to allege any risks from which men but not women were protected, and therefore failure to state a claim upon which relief may be granted.

DORMITORY CURFEWS

Dormitory curfew restrictions on female students were upheld as constitutional in Robinson v. Board of Regents of Eastern Kentucky Univ., 475 F.2d 707 (6th Cir. 1973), cert. denied, 416 U.S. 982 (1974). The court found the curfew restrictions for women rationally related to the goal of safety, even though later curfews were set for Wednesdays and Saturdays, id. at 711:

> . . . the State could properly take into consideration the fact that on weekend nights many coeds date and ought to be permitted to stay out later than on weekday nights. A classification having some reasonable basis does not offend the equal protection clause merely because it is not drawn with mathematical nicety.

After finding sex was not a suspect classification and the right of minors to regulate one's own house without parental consent was not fundamental, the court applied the rational basis test. Differential treatment of male and female students, founded on reasonable objectives, did not overcome the presumptive validity of the curfews. Under the new Title IX regulations, such curfews would be unlawful. See p. 169, infra.

MARRIED WOMEN - TUITION

In Samuel v. University of Pittsburgh, 375 F.Supp. 1119 (W.D. Pa. 1974), appeal dismissed, 506 F.2d 355 (3rd Cir. 1974), the university adopted the rebuttable presumption that a married woman's domicile was the domicile of her husband, but not vice versa for purposes of determining tuition rates. Women were permitted to rebut this presumption with evidence of nine criteria (such as agreement to accept full time post-graduate employment in Pennsylvania, location of bank accounts, voter registration, in-state drivers license, etc.) No single factor was determinative. The university possessed absolute discretion to determine if the evidence rebutted the presumption. Defendants justified this special rule on three grounds: (1) the need to preserve its fiscal integrity, (2) the common law assumption that married women reside with their husbands and (3) administrative convenience. Applying a "rigorous rational basis test," the court asked if a rational interest was furthered by the residency rules and if certain basic personal rights were infringed on. The court concluded, id. at 1130:

> If such a burden [procedural, financial, or otherwise] was placed on one group of women, but not upon men or upon another group of women, then whether that burden is rebuttable or irrebuttable is immaterial; defendants residency rules would be unconstitutional . . . .

OTHER DISCRIMINATIONS

Differential treatment of men and women persists in almost every segment of education. It insinuates itself into textbooks, counseling, recruitment practices at colleges and universities (by e.g., relying on alumni for recruiting), and many other practices. Case law on these areas is not well-developed, unfortunately. Fortunately, however, federal legislation now comprehensively bars sex discrimination in programs which are federally funded. For additional references see Pietrofessa and Schlossberg, Perspectives on Counselor Bias: Implications for Counselor Education, 4 COUNSELING PSYCHOLOGIST 44 (1973) and I.K. and D.M. Broverman, Clarkson, Rosenkrantz and Vogel, Sex Role Stereotypes in Clinical Judgments of Mental Health, 34 J. OF CONSULTING AND CLINICAL PSY. 1 (1970).

CONCLUSION

In certain limited areas, the equal protection clause of the fourteenth amendment will protect females who are denied the same privileges as males. These include admission to schools and to courses, admission to male athletic opportunities, at least for non-contact sports, and equal treatment in tuition charges. In other cases, state constitutional or legislative provisions may protect the female, as in the case of access to contact sports, for example. Federal legislation may also provide additional protection, depending on the enforcement program adopted. See p. 169-70, infra.

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TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Title IX of the Education Amendments of 1972 prohibits descrimination in federally assisted education programs against students and employees on the basis of sex. The key provision of Title IX reads,

> . . . No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

Education Amendments of 1972, Sec. 901(a), 20 U.S.C. 1681(a) (1974).

The statute is silent on how an individual may initiate a complaint, standards for enforcement by DHEW, and details on what constitutes discrimination. In many respects it resembles Title VI of the Civil Rights Act, 42 U.S.C. 2000d (1974) which comprehensively bans discrimination on account of race, color or national origin in all federally-assisted programs. The experience under the latter has shown the DHEW--the only federal agency to attempt wide scale enforcement in grant programs--moves only very slowly in its determination to withhold funds, and more often merely threatens to do so. Thus, individuals seeking speedy relief will still be better off filing an action in federal or state court alleging a denial of equal protection.

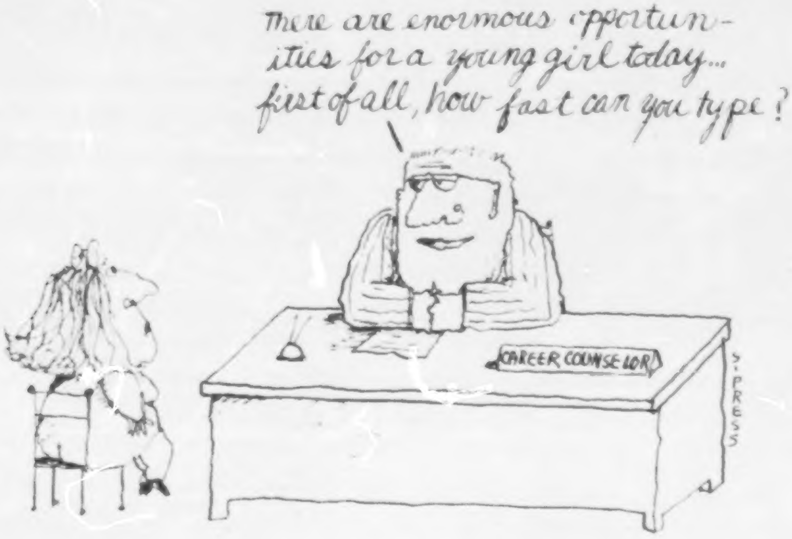
There are some specific exceptions and exemptions in the law. First, bans on admissions bias apply only to "institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education . . . ." 20 U.S.C. 1861(a)(1). Second, an institution controlled by a religious organization is exempt to the extent that the application of the anti-discrimination provisions is not consistent with the religious tenets of the organization. 20 U.S.C. 1681(a)(3). Discrimination in such institutions on the basis of sex for reasons of custom, convenience or administrative rule presumably is prohibited. Third, a military school is also exempt if its primary purpose is to train individuals for the military services of the United States or the merchant marines. 20 U.S.C. 1681(a)(4).

The statute specifically does not require sex quotas, but authorizes statistical evidence as proof of bias. 20 U.S.C. 1681(b).

The regulations under Title IX are comprehensive and far-reaching. See Fed. Reg. 24127 et seq. (June 4, 1975) (effective date, July 21, 1975) (to be codified as 45 C.F.R. 86.1 et seq.) These regulations make it clear that sexual discrimination in any part of a federal program, not just those directly receiving federal assistance, disqualify the agency as a recipient, (secs. 86.11 & 86.31(a)),even if the discrimination takes place in a separate, but closely related, agency (one which receives substantial assistance from the recipient agency). Sec. 86.31(b)(7). The regulations contain specific rules for scholarships and other financial assistance, sec. 86.37, employment assistance, sec. 86.38, recruitment, sec. 86.23, admissions, secs. 86.21, 86.15(d), (e), coverage to all related activities, including "health, physical education, industrial, business, vocational, technical, home economics, music and adult education courses," sec. 86.34 access to courses such as home economics or shop, sec. 86.34 (except sex education or physical education courses may be separated), access to vocational and other schools, sec. 86.35, employment of students, sec. 86.38, counseling, sec. 86.36, and health and insurance services, secs. 86.39 and 86.56(b). Accommodations for men and women must be comparable in housing, sec. 86.32(b) (although there may be sex segregation in the housing and other facilities (sec. 86.33) (although toilets and the like may be segregated). A section on athletic participation promises general equality, but permits separate teams for competitive skill and contact sports. In competitive, non-contact sports, however, one sex must be permitted access to the team of another sex if none other is available. Sec. 86.41. Discrimination on account of marital or parental status is barred. Secs. 86.57, 86.21(c). Some general provisions bar sex discrimination in allocation of benefits generally, including academic and research opportunities. Sec. 86.31. Rules for appearance, sec. 86.31(b) (5) and tuition 86.31(b) (6) must be uniform.

AMENDMENTS TO THE PUBLIC HEALTH SERVICE ACT PROHIBITING SEX DISCRIMINATION

Another earlier federal law prohibiting sex discrimination among students became effective on November 18, 1971. Titles VII and VIII of the Public Health Service Act (PHSA), were amended to prohibit sex discrimination in admissions to federally funded health training programs. Public Health Service Act, 42 U.S.C. secs. 295h-9 and sec. 298b-2 (1974). Implementing regulations for the PHSA became final August 6, 1975. 40 Fed. Reg. 28572 (July 7, 1975) (to be codified as 45 C.F.R. 83.1 et seq.) The main objective of the PHSA regulations is to eliminate sex discrimination in all health training programs operated by an entity which receives support under Title VII or Title VIII of the PHSA and thereby ensure that maximally qualified health personnel are trained.


There are enormous opportunities for a young girl today... first of all, how fast can you type?
CAREER COUNSELOR
S. PRESS

Cartoon by David Sipress

CONSTITUTIONAL AMENDMENT AND STATE RIGHTS TO BE FREE OF DISCRIMINATION

Some states have constitutional or legislative provisions extending additional protection to those discriminated against on account of sex. For example, under the Washington equal rights amendment (ERA), "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Wash. Cont. art. 31. Another constitutional provision, art. 9, sec. 1, provides:

> It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

Finally, Washington has a parallel to the equal protection clause of the fourteenth amendment to the federal constitution, art. 1, sec. 12. These provisions were construed to permit two sisters, both of whom were qualified on all counts except sex, to play football on their school's team. *Darrin v. Gould*, No. 43276 (Wash., Sept. 25, 1975) (Clearinghouse No. 16,595). Four justices subscribed to a separate opinion making it clear that only the ERA would require this result, and not the fourteenth amendment or other provisions of the state constitution, all of which were mentioned (ambiguously) in the main opinion. The Pennsylvania ERA is quite similar to Washington's. It reads, Penn. Cont. Art. 1, § 28: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of sex of the individual." This has been given a broad and liberal construction. See *Pennsylvania v. Pennsylvania Interscholastic Athletic Ass'n*, Pa. Commw. , 334 A.2d 839, 842 (1975).

> Moreover, even where separate teams are offered for boys and girls in the same sport, the most talented girls still may be denied the right to play at that level of competition which their ability might otherwise permit them. For a girl in that position, who has been relegated to the "girls' team" solely because of her sex, "equality under the law" has been denied.

Thus, the court held that the equal rights amendment granted females access to all sports; even though football and wrestling were excluded from the complaint, the court stated that female athletes must be admitted to these teams. Under the state ERA, persons could not be excluded from sports or assigned to teams on the basis of norms for their sex. Instead, individual abilities must be considered and accommodated. 334 A.2d at 843:

> The notion that girls as a whole are weaker and thus more injury-prone, if they compete with boys, especially in contact sports, cannot justify the By-law in light of the ERA. Nor can we consider the argument that boys are generally more skilled. This existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic. Wiegand v. Wiegand, 226 Pa. Super. Ct. 278, 310 A.2d 426 (1973). If any individual girl is too weak, injury-prone, or unskilled, she may, of course, be excluded from competition on that basis but she cannot be excluded solely because of her sex without regard to her relevant qualifications. We believe that this is what our Supreme Court meant when it said in *Butler*, *supra*, that: "Sex may no longer be accepted as an exclusive classifying tool."

Likewise, in Darrin v. Gould the court rejected attempts to justify the exclusionary rule on the basis of girls' generally lighter stature and greater susceptibility to injury, observing that the athletic association had permitted slightly built boys to play, and that special devices could be arranged to protect the girls' breats, where extra injury was possible. The court also rejected evidence that girls on the boys' football team would be disruptive to the girls' athletic program as conjectural and based on opinion.

Michigan statutes also provide specifically for admission for females to non-contact sports:

> Female pupils shall be permitted to participate in all noncontact interscholastic athletic activities, including but not limited to archery, badminton, bowling, fencing, golf, gymnastics, riflery, shuffleboard, skiing, swimming, diving, table tennis, track and field and tennis. Even if the institution does have a girls' team in any non-contact interscholastic athletic activity, the female shall be permitted to compete for a position on the boys' team. Nothing in this subsection shall be construed to prevent or interfere with the selection of competing teams solely on the basis of athletic ability.

Mich. Comp. L. Ann. 340.379, Mich. Stat. Ann. 15.3379; Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973), affirming a preliminary injunction ordering access for females to boys' sports but modifying it to the extent that contact sports would not be included within the terms of the order.

An amendment to the United States Constitution providing for equal opportunity among the sexes would undoubtedly expand the opportunities available to women in the same way as these state provisions have. The federal equal rights amendment has now been ratified by 34 of the 38 states needed for approval.

Cartoon by A. Wanper

III(C)(4) Additional Examples of Equal Protection Cases

In addition to school segregation, and sex and wealth discriminations, courts have from time to time considered equal protection arguments involving other types of classifications. This section briefly sets forth examples of these cases.

NON-ENGLISH SPEAKING STUDENTS

Sometimes it is linguistic difficulties that earn the child the title of being a slow learner. See generally CENTER FOR LAW AND EDUCATION, CLASSIFICATION MATERIALS (Revised ed. Sept. 1973). The Supreme Court has recently recognized this truism in Lau v. Nichols, 414 U.S. 563 (1974), where the Court unanimously agreed that the failure of the San Francisco school system to provide English language instruction to its non-English speaking Chinese students violated section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000(d) (providing for non-discrimination in programs receiving federal assistance). Of basic significance to the Court's conclusion was the right of the student to "a meaningful opportunity to participate in the educational program." Id. at 568.

Lower courts have also found a violation of the equal protection clause and have required special language instruction for Spanish-speaking students. E.g., Serna v. Portales Municipal Schools, 351 F.Supp. 1279 (D.N.M. 1972), aff'd on other grounds, 499 F.2d 1147 (10th Cir. 1974); United States v. Texas, 342 F.Supp. 24 (E.D.Tex. 1971), aff'd, 466 F.2d 518 (5th Cir. 1972). See generally Grubb, Breaking the Language Barrier: The Right to a Bilingual Education, 9 HARV. CIV. RTS. CIV. LIB. L REV. 52 (1974).

Lau left open the question of remedy -- the type of program needed. This question was faced in Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974). The court upheld the district court's rejection of a school district program as inadequate, and the trial court's ordering of a bilingual/bicultural program that would insure a meaningful education. For additional discussion of the approaches taken in designing such remedies see Rice, Recent Legal Developments in Bilingual/Bicultural Education, 19 INEQUALITY IN EDUCATION 51 (Feb. 1975)(comparing Serna v. Portales Munici-

pal Schools, 499 F.2d 1147 (10th Cir. 1974), *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973), *on remand*, 380 F.Supp. 673 (D.Colo. 1974), *Aspira v. Board of Educ. of City of N.Y.*, 58 F.R.D. 62 (S.D.N.Y. 1973) and *Lau v. Nichols*, 414 U.S. 563 (1974).

The Center for Law and Education is currently working on materials on bilingual/bicultural education.

THE HANDICAPPED

What of the child who, regardless of race or socioeconomic background, has a physical or mental handicap which mandates some sort of special education? The two major cases giving him or her a right to such education are *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F.Supp. 1257 (E.D.Pa. 1971), *aff'd*, 343 F.Supp. 279 (1972) (a three-judge court) and *Mills v. Board of Educ. of the District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972). In the most recent action in *Mills*, on March 27, 1975, Judge Waddy held the District of Columbia School Board and Mayor in contempt for failure to place 43 children in appropriate classes. Civil No. 1934-71 (D.C.D.C. March 27, 1975). See generally, CLASSIFICATION MATERIALS (Revised ed., 1973).

A more recent state case, *In re G.H.* 218 N.W.2d 441 (N.D. 1974), sustains the right of the handicapped to an education at state expense, holding that a handicapped child who was a ward of the state should have her tuition paid by the school district in which she had been living. The Court found that education was a fundamental right under North Dakota law and suggested that "G.H.'s terrible handicaps were just the sort of 'immutable characteristic determined solely by the accident of birth' to which the inherently suspect classification would be applied." 218 N.W. 2d at 447.

Other recent cases involving funding of special education include *Denver Ass'n of Retarded Children, Inc. v. School Dist. No. 1 of Denver*, 535 P.2d 200 (Colo. 1975), (if school district maintains free kindergartens for normal children it must also finance kindergartens for the handicapped); and *In re Kirschner*, 74 Misc. 2d 20, 344 N.Y.S. 2d 164 (Family Ct. 1973)(cannot charge parent for the cost of educating a handicapped child while providing free public education to others). Also see *In re M*, 73 Misc. 2d 513, 342 N.Y.S. 2d 12 (Family Ct. 1972)(physically handicapped child entitled to state funds for special school unless the public school system can prove it has adequate special facilities). A pending case of interest is *Halderman v. Pittenger*, 391 F.Supp. 872 (E.D. Pa. 1975)(order to convene three-judge panel in an action for reimbursement of the total costs of a private school, even if it exceeded the statutory maximum).

A new and more demanding standard may be found in the decision announced in *Maryland Ass'n for Retarded Childen, Inc. v. Maryland*, (Baltimore Co., Equity No. 776 76, Apr. 9, 1974)(memoranda *re* intended decision) which was premised on the concept of "thorough and efficient education" mandated by the state constitution. The court defined education as any plan or structured program designed to help individuals achieve their full potential, *id.* at 4, and ordered that programs be provided that will develop the ability and potential of all mentally retarded children to the fullest possible extent regardless of how severely and profoundly retarded they may be.

A case to watch which relies primarily on recent federal acts as well as the equal protection clause was filed in the spring of 1975. *Mattie T. v. Johnston*, Civil No. DC-75-31-5 (N.D.Miss.

April 25, 1975)(claiming violation of the Education for the Handicapped Act, Part B, 20 U.S.C. Sec. 794; and Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. Sec. 241 et seq.) (Clearinghouse Number 15,299).

Handicapped students are also winning recognition as full citizens with the same rights as normal children in other areas, such as athletics. In Cavna v. Shay, Civil No. 74-526 (E.D. Pa. 1974)(Clearinghouse No. 12,847) the court issued a consent decree in which a visually handicapped child won the right to participate in a town-sponsored summer recreational softball program, after the parents signed a waiver absolving the town from liability arising from his participation.

MARRIED STUDENTS

Cases where married students have been granted fewer opportunities than others have been prosecuted on three theories: (1) lack of a rational basis, (2) infringement upon the fundamental right to marry and (3) exclusion from the important right of education. See generally, CLASSIFICATION MATERIALS (revised ed. September 1973) at 153.

Recent cases include Hollon v. Mathis Ind. Sch. Dist., 358 F.Supp. 1269 (S.D. Tex. 1973), vacated for mootness, 491 F.2d 92 (5th Cir. 1974)(granting a temporary restraining order to prohibit male married student's exclusion from interscholastic league athletics activity); Charron v. Board of Sch. Dir. of Sch. Admin. Dist. No. 6, Civil No. 12 (Temporary restraining order) (S.D. Me. Oct. 7, 1970); O'Neill v. Dent, 364 F.Supp. 565 (E.D.N.Y. 1973)(striking down statute prohibiting attendance by married cadets at the U.S. Merchant Marine Academy). Also see Bell v. Lone Cak Ind. Sch. Dist., 507 S.W.2d 636 (Tex. App. Ct. 1974)(majority opinion)(Cornelius, J. concurring at 639)(There is no relation between marital status and athletic participation), dismissed in part as moot, 515 S.W.2d 252 (Tex. Sup. Ct. 1975).

An excellent discussion of the case law in this area may be found in Indiana High Sch. Ath. Ass'n v. Raike, Civil No. 2-273-A-38 (Ind. App. Ct. May 12, 1975)(slip opinion)(Clearinghouse Review No. 15,758). The court upheld a superior court's decision to grant a declaratory judgment and permanent injunction against the exclusion of a married student from his high school's athletic program, ruling the classification unreasonable as both over- and under-inclusive. The classification was deemed over-inclusive in that it included some married students of good moral character who would not corrupt their fellow students or contribute to an unwholesome atmosphere, and under-inclusive in that single persons of bad moral character were unaffected.

The court also found the classification defective in that it contravened public policy of allowing teenagers to marry to legitimatize offspring resulting from premarital sex, citing Romans v. Crenshaw, 354 F.Supp. 868, 870 (S.D. Tex. 1972)(exclusion from nonathletic extracurricular activities because of marital status unconstitutional), which observed:

> A rule that would punish the necessary legitimization of an offspring (by getting married) would in its purblind application effectively reward the bastardizing of the offspring.

But cf. Bynes v. Toll, 512 F.2d 252 (2nd Cir. 1975)(rejecting a claim based on right to marital privacy and right to raise children as grounds for striking down a university provision excluding children from married students housing) and Parish v. National Collegiate Athl. Ass'n, 506 F.2d 1028 (5th Cir. 1975)(rule barring athletes who do not earn minimum grade point average found to have rational basis).

PARENTS

A 1973 decision supplements the CLASSIFICATION MATERIALS at 151-152 on pregnancy and unwed motherhood: The court in Houston v. Prosser, 361 F.Supp. 295 (N.D. Ga. 1973) found the school board policy of excluding an unwed mother from the day school fair and valid on its face, because the plaintiff had the opportunity to attend night school; but held it to be a violation of the equal protection clause, as applied, because there was a tuition charge for the evening session. Analogies may be drawn between the school's policy of excluding pregnant students and similar policies toward pregnant teachers. Cf. Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) (right to be free from unwarranted governmental intrusion into matters so fundamental as the decision to bear a child). But see Bynes v. Toll, 512 F.2d 252 (2nd Cir. 1975)(upholding the exclusion of students with children from college dormitory).

AGE CLASSIFICATIONS

Another basis for exclusion for normal children is discrimination because of age. In a non-school case, an early District of Columbia decision, In re P.J., Civil No. 922976 (D.C. Super. Ct. Feb. 6, 1973), the judge, after finding that a 17-year old was entitled to an abortion on the grounds she would suffer physical and mental anguish, also found that if the respondent were denied an abortion solely because of her chronological age, it would be a denial of rights and benefits guaranteed by the Constitution and the Bill of Rights.

The most explicit statement of this right was made by the court in Foe v. Vanderhoff, Civil No. 74-F-418 (D. Colo. Feb. 5, 1975) (Clearinghouse Review No. 13,046 E). A minor brought action seeking a declaration that a Colorado law requiring parental consent before a minor may obtain an abortion was unconstitutional. At the time of the abortion, plaintiff was supporting herself, was living away from home, and made a voluntary and informed decision regarding her abortion. The court ruled in favor of the plaintiff, on three bases: (1) The right to privacy extends to minors and thus, a minor has a right to an abortion absent some compelling state interest in limiting her right. (2) The state's interest in protecting minors "from improvident, hasty and uninformed decisions" is not served by a statute that creates a blanket requirement of parental consent without making exceptions for minors who are supporting themselves, "mature, emancipated, or who have received counseling and guidance." (3) The state's interest in fostering parental control is not sufficiently compelling to justify this broad and unrestricted intrusion into a minor's own constitutional rights. This case should be read carefully as it has implications for a wide range of issues relating to the rights of minors.

Unjustifiable age discrimination has also been successfully demonstrated in student housing. In Cooper v. Nix, 496 F.2d 1285 (5th Cir. 1974), the court ruled that a regulation exempting students age 23 and over, but not those in age groups 21-23 from on-campus residence requirements was invalid as lacking any rational basis. See also Mollere v. Southeastern Louisiana Col., 304 F.Supp. 826 (E.D. La. 1969)(rule requiring girls under 21 to live on campus while allowing others to live off-campus where only reason given is to raise revenue is violative of equal protection). But see, Prostrollo v. University of S. Dakota, 507 F.2d 775 (8th Cir. 1974), cert. denied, 95 S. Ct. 1687 (1975)(discussed infra at pp. 212-13). Cf. Richard V. Reading Housing Authority, Civil No. 72-2339 (E.D.Pa. Jan. 26, 1973)(ordering housing authority to provide emancipated minors with public housing).

One of the first successful challenges involving age discrimination in attending college is Miller v. Sonoma, Civil No. C-74-0222 (unreported opinion, N.D. Cal., Aug. 26, 1974) which was, however, decided essentially on due process grounds. In Miller. a California district court found unconstitutional a community college policy which excluded some non-high school graduates under 18.

NON-RESIDENTS

The practice of charging higher tuition for non-residents at universities and public schools seems unlikely to disappear very soon. The plurality in Vlandis v. Kline, 412 U.S. 441 (1973) seemingly approved that device, or at least accepted it as a permanent irrebutable presumption. Id. at n. 9. The decision was so interpreted by Justice Marshall in Memorial Hospital v. Maricopa Co., 415 U.S. 250, n. 12 (1974). Thus, there does not appear to be five votes on the Supreme Court waiting to strike down the residency requirement for tuition purposes. The sixth circuit expressly upheld the one-year residency requirement as a qualification for in-state tuition in Hooban v. Boling, 503 F.2d 648 (6th Cir. 1974)(citing Vlandis v. Kline) and in Kelm v. Carlson, 473 F.2d 1267, 1271 (6th Cir. 1973). See also Montgomery v. Douglas, 388 F.Supp. 1139 (D. Colo. 1974)(upholding requirement of one year domicile in Colorado preceding registration for in-state tuition); Dallam v. Cumberland Valley Sch. Dist., 391 F.Supp. 358 (M.D.Pa. 1975)(upholding rule barring high school student from interscholastic athletic activity for one year, if newly transferred to school and not living with parent or guardian). Cf. Hayes v. Board of Regents, 495 F.2d 1326 (6th Cir. 1974).

However, exclusion on account of residency may be another matter. See, Cabrillo Comm. Col. Dist. v. California Jr. Col. Ass'n, 118 Cal. Rptr., 708, 44 Cal. App. 3d 367 (1975). The court ruled that any high school graduate should be admitted to the community college of his or her choice irrespective of the length of time that the student had resided in a particular community college district; that admission to a community college athletic program is tantamount to being admitted to any other educational program of the college; that the athletic residency requirements promulgated by the association for its members (community colleges, public and private) are also violative of state law insofar as they impose additional residency requirements upon students who wish to participate in community college athletic programs after they have already been duly admitted to the institution. The Court also ruled that the college could not prevent the student from trying out for an interscholastic athletic program merely because of failure to meet a length-of-residency requirement. Residency requirement for elementary or high school students are even more vulnerable. See *e.g.*, *Brownsville Ind. Sch. Dist. v. Bamboa*, 498 S.W. 2d 448 (Tex. App. Ct. 1973). The court held that a child who had lived in the school district with his aunt who was his guardian for 16 months was a resident either in his own right or through his aunt's guardianship.

Aliens are also a special category, and tuition differentials based on alienage rather than non-residency are inherently suspect. Thus, in *Jagnandan v. Giles*, 379 F.Supp. 1178 (N.D. Mass.) 1974) the court struck down a statute classifying all alien students, irrespective of actual residency, as non-residents for tuition purposes. See also *Coba v. Board of Trustees*, Civil No. 74C 2772 (N.D. Ill. Feb. 27, 1975)(classification of political refugees pending recognition as permanent residents; by stipulation, policy changed so that plaintiffs could become eligible for in-state tuition rates)(Clearinghouse Review No. 13,649).

INEQUALITY IN DISCIPLINE

As a general rule, discipline for truancy or for any other wrong doing cannot be made an instrument of racial discrimination. *Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964); *Dunn v. Tyler Ind. Sch. Dist.*, 327 F.Supp. 528 (E.D. Tex. 1971)(dictum), *modified*, 460 F.2d 137 (5th Cir. 1972). However, because courts can fail to recognize facts establishing such discrimination, an enlightened court is more helpful to an attorney than any number of statistics. A leading Texas case, *Hawkins v. Coleman*, 376 F.Supp. 1330 (N.D. Tex. 1974) found that "white institutional racism" was the chief cause of the disproportionate number of blacks receiving suspensions and corporal punishment within a school district. The court stated that there was a need for the district to be responsive to the needs of black students by acting in terms of institutional and structural change, in terms of training of teachers and counselors, in terms of training students to deal with institutional racism, and in terms of community affirmative action. However, the court's order was limited to "review[ing] its present program" and "put[ting] into effect an affirmative program aimed at materially lessening 'white institutional racism' . . . ." *Id.* at 1338.

Statistics generally support allegations that disciplinary actions are often racially discriminatory. A 1973 survey shows that black, Spanish surnamed, Asian-American and Native American students are expelled or suspended twice as often as white students. See generally HEW FACT SHEET: STUDENT DISCIPLINE, May 1975, and Sept. 1975;[*] Miller, *Student Suspension in Boston: Derailing Desegregation*, 20 INEQUALITY IN EDUC., 16 (July 1975) (Background material); and Demarest and

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[*] Excerpted at p. 180, *infra*. Note that the DHEW has followed up with new guidelines for record-keeping in disciplinary cases.

Jordan, Hawkins v. Coleman: Discriminatory Suspensions and the Effect of Institutional Racism on School Discipline, 20 INEQUALITY IN EDUC., 25 (July 1975) (discussing Hawkins v. Colemen). But see Rhyne v. Childs, 359 F.Supp. 1085 (N.D. Fla. 1973), aff'd sub nom., Sweet v. Childs, 507 F.2d 675 (5th Cir. 1975) (fact that statistics showed more blacks than whites were suspended or expelled was a "fortuitous circumstance") and Tillman v. Dade County Sch. Bd., 327 F.Supp. 930 (S.D. Fla. 1971) (fact that 87 of 93 students suspended for interracial fighting were black was due to blacks being easier to identify because of a "fortuitous circumstance"). Cf. Carbonaro v. Reeher, 392 F.Supp. 753 (E.D. Pa. 1975) (upholding state law requiring extra burden on ex-felons to prove they are of "satisfactory character" to qualify for financial aid for state colleges and rejecting argument that the statute was racially discriminatory because of disproportionate number of minority convictions.

A motion for further relief on alleged discriminatory discipline is pending in Morgan v. Hennigan, Civil No. 72-911-G (D. Mass. June 21, 1974), the Boston desegregation case. Supporting affidavits and a memorandum were filed with the motion. (Clearinghouse Review No. 13,159)

Discriminatory disciplinary proceedings also may be instituted as a result of sex discrimination. See e.g., Jacobs v. Benedict, 39 Ohio App. 2d 141, 316 N.E.2d 898 (1973) (hair regulations applicable only to males found invalid). School officials may also attempt to discriminate against those intrepid students who dare institute suits against the system. In Herman v. University of South Carolina, 457 F.2d 902 (4th Cir. 1972) the bench noted that most students permanently expelled as a result of a sit-in had been reinstated, but school officials told the plaintiff that he would not receive any consideration of reinstatement while the suit was pending. While the court felt unable to dispose of the case on the basis of events occurring subsequent to the institution of the suit, it stated, id. at 902:

> . . . if others, whose participation in the events leading to disciplinary action was not less culpable than that of plaintiff, were forgiven and reinstated, we would see a substantial denial of equal protection of the laws if plaintiff were not afforded similar treatment.

Finally, it should be noted that many similar cases were settled on substantive or procedural due process grounds. See e.g., Woods v. Wright, 334 F.2d 369 (5th Cir. 1964)(Black students who had been arrested for parading without a license to protest racial discrimination were subsequently suspended or expelled from school); Gay Students Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974) (denial of a homosexual college group to hold college-sanctioned functions) and Quintanilla v. Carey, Civil No. 75-C-829 (N.D. Ill. Mar. 31, 1975)(allegations that disciplinary action was a result of student's role as Latino activist held irrelevant where due process had clearly been violated).

Jane Samuels
Center for Law and Education
August 15, 1975

Appendix to Part III(C)(4)(g): HEW Fact Statement and Guideline

[U.S. DHEW, Fact Sheet, Student Discipline (Sept. 1975)]: [The statement is based on a 1972-73 survey of school systems -- operating under a plan of desegregation or having a minority enrollment of over 10%.]

The survey . . . reports a total of 23,984,721 students in the 2,908 systems surveyed. Of the total, 36,881 students were expelled from school and 930,429 were suspended at least once for an average suspension of 3.9 days.

Minority students accounted for 38 percent of the total enrollment, but they also accounted for 43 percent of the expulsions and 49 percent of the suspensions. The average suspension for a minority student was 4.3 days as compared to 3.5 days for a non-minority student. . . .

. . . Black students received the greatest proportion of disciplinary actions. Of the 36,881 expulsions, Native American Indians received 222 (about 1 percent), Asian-Americans 111 (under 1 percent), Spanish-surnamed 2,083 (6 percent), and Black Americans 13,503 (37 percent). Non-minority students [62 percent of total] . . . received 19,482 expulsions or 55 percent of the total.

A total of 393,057 Black students were suspended from school at least once (42 percent of all suspensions) while 4,111 Native American Indian (0.5 percent), 2,000 Asian-American (0.5 percent) and 58,174 Spanish-surnamed students (6 percent) were sent home at least once. . . .

Black students were suspended for an average of 4.5 days -- a full day more than the average of 3.5 days for non-minority students. . . .

. . . The days for all students suspended at least once totalled 3,656,376. Of this figure the minorities compiled 54 percent and the non-minorities 46 percent, although minorities were only 38 percent of the total enrollment . . . .

School systems in the southern and border States appear to mete out disciplinary actions more frequently and for longer periods. . . .

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III(D) Substantive Due Process

INTRODUCTION

A concept of substantive due process has slowly been evolving since the birth of the bill of rights. Initially, the concept was relatively concrete -- the fourteenth amendment's definition of due process, which applied to states, was held to encompass the first amendment's guarantee of free speech and press, which applied to the federal government, *Gitlow v. New York*, 268 U.S. 652 (1925); *Schneider v. State*, 308 U.S. 147, 160 (1939); *Douglas v. Jeannette*, 319 U.S. 157, 162 (1943). Thus, one-by-one, the basic rights guaranteed to citizens of the United States were extended to citizens of the several states through the due process clause of the fourteenth amendment. See, *e.g.*, *Powell v. Texas*, 392 U.S. 514 (1968)(eighth amendment); *Escobedo v. Illinois*, 378 U.S. 478 (1964)(right to counsel under sixth amendment); *Robinson v. California*, 370 U.S. 660 (1962)(eighth amendment); *Monroe v. Pape*, 365 U.S. 167 (1961)(search and seizure protections of fourth amendment); *Powell v. Alabama*, 287 U.S. 45 (1932)(sixth amendment right to counsel in felony cases).

In addition, the court has in the past also been willing to define substantive rights under the due process clause of either the fifth or fourteenth amendment. To distinguish these substantive rights from procedural rights, we have used the test of finality of relief: a student who has been denied substantive due process cannot ever be punished for the offense allegedly committed while the substantive defect was in operation, whereas a student who has been refused procedural due process can usually be punished upon the completion of a fair and adequate hearing. Of course, a substantive defect in a statute can be corrected, and students can thereafter be punished for similar acts.

Based upon this analysis, the first note in this section is on the problem of vagueness -- the situation where a student is disciplined according to a rule which is so poorly specified that it is unlikely that the student knew at the time of committing the offending act that he or she would be subjected to punishment as a result. Such a defect, if found to exist by a court of law, would permanently taint any disciplinary proceedings against this particular student, and thus, it is classified here as a rule of substantive, rather than procedural due process.

Another category of cases which we have classified as substantive due process are those involving a student's right to determine his or her own appearance. Often these cases are classified under a general "right to privacy." This term should not be confused with the fourth amendment right to privacy. However, inasmuch as a person's decision on appearance and grooming is -- however personal -- not very private in its execution, a fourth amendment right to privacy, standing alone, would not offer the long-haired student adequate protection upon a careful analysis. Thus, in the context of grooming decisions, we are more comfortable with a substantive due process argument -- which holds that state governmental action must not offend our sense of justice as expressed generally in the bill of rights, including a "penumbra" which emanates from the first, fourth, fifth, and ninth amendments. (In the alternative, an equal protection argument is also valid, where grooming rules are applied to some but not all students.) The full discussion of our analysis of grooming regulations appears in Part III(D)(2), infra.

The third note in this group, Part III(D)(3), infra, concerns freedom from the "long arm" of the school -- that is, freedom from control by school authorities in other personal, sometimes private spheres of life. This should include freedom to live at a place of the student's choosing, rather than be required to live in university dormitories. It should also include freedom from regulation of off-campus activities and one's status where it bears little or no relation to one's standing as a student (e.g., marital status). A fourth area of substantive due process is discussed at p. 318, infra, under the note on Excessive Punishment.

For another discussion of the applicability of substantive due process, see Merle McClung, The Problem of the Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavior Problems? 3 J. OF L. & EDUC. 491 (1974)(a version of which appears in the CENTER FOR LAW AND EDUCATION, CLASSIFICATION MATERIALS (Revised ed., 1973) at 155.

The due process clause has also been held to guaranty a limited number of substantive rights which are not expressly guaranteed by any amendment or combination of amendments. Thus, the Court has identified some right to be free of governmental interference in certain personal and private affairs. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 399, 402-03 (1923)(right to have children instructed in German; Court recognized broader right to rear children as parent sees fit); Pierce v. Society of Sisters, 268 U.S. 510 534-35 (1925)(right to select private schooling for child, derived from a broader right to rear children); Griswold v. Connecticut, 381 U.S. 479 (1965) (possession of contraceptives protected under a "penumbra" extending from the first amendment to certain essentially personal decisions relating to family life); Loving v. Virginia, 388 U.S. 1 (1967)(interracial marriage protected under both equal protection and due process clause); Roe v. Wade, 410 U.S. 113, 153 (1973)(limited protection extended to decision to have an abortion under due process clause); Board of Educ. v. LaFleur, 414 U.S. 632 (1974)(compulsory maternity leave without pay for female teachers struck down as interfering with a right to marriage and procreation, derived from the due process clause).

Where the Court is willing to identify a specific right of substantive due process, it has usually also characterized this right as "fundamental." Upon doing so, the Court is indicating that it will apply stricter tests when reviewing the limitation itself and the statutory language creating the infringement. If a right is fundamental, it may not be limited by the state unless there is a "compelling state interest," and, in addition, the relevant statute must be narrowly and precisely drawn to confine it to those "legitimate state interests at stake" which the court will recognize as sufficiently compelling. Roe v. Wade, 410 U.S. at 155.

There is, of course, a close relation between these due process cases and equal protection cases. Once a fundamental right is identified under the due process clause, it should also trigger a stricter test in equal protection cases. See Part III(C)(1), at p. 145, supra. See also Eisenstadt v. Baird, 405 U.S. 438 (1972), where the court found that it denied equal protection to restrict unmarried persons' use of contraceptives while permitting it to marrieds. The court applied a strict scrutiny test, rejecting, for example, the argument that the classification was justified by the state's interest in preventing fornication on grounds that the penalty for the latter was much less than the penalty for using contraceptives. Sometimes, too, a fundamental right under the due process clause will first be identified in an equal protection case, as the Court must determine what kind of test to apply. See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation deemed a fundamental right requiring strict scrutiny of a law which imposed sterilization as a penalty for certain crimes. See also Shapiro v. Thompson, 394 U.S. 618 (1959) (Court identified a fundamental right to travel triggering strict scrutiny of law requiring welfare recipient to live in state one year).

One unenumerated right which is clearly not fundamental is the right to contract. The contract right was the unenumerated right involved in Lochner v. New York, 198 U.S. 45 (1905) and subsequent cases following Lochner. In Lochner the Court struck down a state law limiting the hours of bakers as violative of this personal right. There was little discussion of what test to be applied, 198 U.S. at 57:

> The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.

In the framework of the modern constitutionalist, it is obvious, especially after reading the dissent, that the court was applying "strict scrutiny." It rejected numerous arguments, apparently grounded on statistical evidence, that the baker's profession was unhealthy and hazardous, and the law was passed as a health measure. The Court pointed out that all occupations held some hazards, and argued that even professional men, including lawyers, could be limited if they accepted the argument based on health. Id. at 57-58, 60. The Court also rejected an argument that the hours limitation was intended to promote cleanliness among bakery employees. Id. at 62.

When the Court ultimately rejected Lochner, it did not make it clear whether it was rejecting the right to contract as a fundamental right, whether it was rejecting the Court's test of rationality," or both. The first case, West Coast Hotel v. Parish, does not mention Lochner, but only overrules one of its progeny. 300 U.S. 379, 399-400 (1937) (overruling Adkins v. Children's Hospital, 261 U.S 525 (1923) and upholding a minimum wage law for women). In Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963) it is specifically mentioned:

> There was a time when the Due Process Clause was used by this Court to strike down laws which were thought to be unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . [citing Lochner and its progeny].
>
> The doctrine that prevailed in Lochner . . . and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded.

See also Griswold v. Connecticut, 381 U.S. at 481-82 (". . . some arguments suggest that Lochner should be our guide. But we decline that invitation . . . .")

The due process area is one to watch, nonetheless, as the present Court seems uncomfortable with equal protection theories in all but the most **suspicious** type of classifications (e.g., race, national origin, alienage) and cases clearly involving a traditional fundamental right.

It is unlikely, however, that the Court will expand the concept to the point where it was at the time of Lochner, for the memory of that case and the problems it ultimately created, and the criticism it drew for the Court are still very much with us. On the other hand, one author has suggested that the Court may be willing, at the very least, to strike down legislation which creates "irrebutable presumptions." That is, a statute which makes an assumption that certain groups of people will respond in certain ways, and then applies corrective measures without giving a person an opportunity to prove the assumption false, as applied to him or her, violates due process. Sauntry, Irrebutable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to LaFleur, 62 GEO. L. J. 1173 (1974). As this author points out, a majority of the Court has adopted this analysis upon occasion. Id. at 1188-1195. The Court's view in this area is still developing, however. See Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973)(unmarried students were classified as non-resident for tuition purposes if address in prior year was out of state); Stanley v. Illinois, 405 U.S. 645 (1972) (unmarried fathers not permitted custody; court held petitioner was entitled to hearing on question of fitness); Bell v. Burson, 402 U.S. 535 (1971) (uninsured motorist who cannot post security lost license without any hearing on question of fault). Stanley concentrated primarily on an equal protection theory, pointing out that unmarried mothers were granted a hearing on the question of fitness, while Stanley did not. LaFleur focused primarily on the substantive right of the teacher to marry and have children. Vlandis and Bell focused primarily on procedural due process. In each of these, however, the irrebutable presumption was among factors contributing to the decision to invalidate the law. See also Paine v. Board of Regents, 355 F.Supp. 197, 203 (W.D. Tex. 1972), aff'd per curiam, 474 F.2d 1397 (5th Cir. 1973) (automatic suspensions for conviction based on marihuana use created "an irrational and irrebutable presumption that such students are unfit and thereby deprive them of due process of law." But see Dallam v. Cumberland Valley Sch. Dist., 391 F.Supp. 358 (M.D. Fla. 1975).

Like the rule against vagueness, the irrebutable presumption is a defect of the statute or regulation, and its cure will generally depend upon an appropriate amendment. Thus, it is classified here as a rule of substantive due process, rather than procedural.

Of course, there is always the unlikely but valid chance of invalidity under the due process clause because a rule or school action is purely arbitrary and unreasonable. This was the rule prior to *Lochner*, and presumably has been restored upon the clear jettisoning of the *Lochner* line of cases. A statement of the rule can be found in a pre-Lochner case, *Powell v. Pennsylvania*, 127 U.S. 678, 685-66 (1888):

> . . . As it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. . . . The legislature of Pennsylvania . . . we must conclusively presume . . . has determined that the prohibition of the sale of [oleomargarine] . . . will promote the public health, and prevent frauds in the sale of such articles.

See also *Munn v. Illinois*, 94 U.S. 113, 132 (1876)(warehouse rate regulation):

> we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed.

This rule appears in school cases often as dicta, rather than as part of an essential holding. See, *e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925):

> . . . rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competence of the state.

P.M. Lines
Center for Law and Education
September 12, 1975

III(D)(1) Vagueness

A time-honored principle of substantive due process requires that people be given fair notice that a particular word or deed will subject them to serious sanctions before they embark on a course of conduct that leads them into conflict with the rule which frowns upon that word or deed.[1] The rule has generally been stated as follows:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

United States v. Harriss, 347 U.S. 612, 617 (1954); see also *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

This general rule has been applied by the Court wherever a serious sanction was invoked against a person -- regardless of whether the rule was designated as "criminal" or not. *E.g.*, *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925); *Baggett v. Bullitt*, 377 U.S. 360 (1964). In *Baggett v. Bullitt* the state of Washington attempted to require a loyalty oath from its university and college teachers as a condition of employment. The Court found the oath requirement in violation of both the first amendment and the due process clause because of vagueness. The Court quoted *Cramp v. Board of Public Instr.*, 368 U.S. 278, 287 (1961), where it said:

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[1] Care should be taken that it is the rule which is vague and not an exception to it. See *Avard v. Dupuis*, 376 F.Supp. 479 (D.N.H. 1974). A six-year old child was dismissed from kindergarten because he had not been vaccinated. The child's father had requested a religious exemption, pursuant to a statute authorizing this, but it was refused. He challenged the statute, and a three-judge court found language which provided that "A child be excused from immunization for religious reasons at the discretion of the local school board," to be vague and in violation of the due process clause. The defect was not cured by requirements for procedural due process because the lack of standards effectively denied the family a "meaningful right to be heard." The court pointed out that there was no way of knowing what kind of material to present to the board during the hearing, and the board's statement of reasons for dismissal "would be meaningless without standards to which it could be compared." After declaring the clause invalid, however, the court observed that the remaining valid portion of the statute required immunization and refused to grant relief against the dismissal.

The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.

The problem with the vague rule is that it permits those who are enforcing it to make decisions which are entirely unpredictable and which, while not necessarily arbitrary and capricious, are really ex post facto decisions so far as the punished person is concerned.

DEGREE OF CERTAINTY REQUIRED

Few courts deciding on vagueness challenges to laws or regulations touching upon student rights have carefully considered the criteria for deciding whether an acceptable level of certainty has been attained. An exception is Corp. of Haverford Col. v. Reeher, 329, F.Supp. 1196 (E.D.Pa. 1971). The court set forth the following "considerations" and discussed each prior to analyzing the problems of vagueness and overbreadth in the relevant statute, *id*. at 1201:

(1) The nature of the rights threatened by the uncertainty;
(2) The probability that the threatened right actually will be infringed. This has been seen as a function of what sort of tribunal applies the allegedly uncertain standard;
(3) The potential deterrent effect of the risk of such infringement. This would largely be a function of the nature of the penalty imposed by the statute;
(4) The practical power of the federal courts to supervise the administration of the allegedly vague scheme; and
(5) The extent to which the subject area necessitates verbally imprecise regulation.

The first and most important consideration -- nature of the rights -- should require stricter scrutiny where the statute on its face or as applied is interpreted to include some prohibition on free expression.

VAGUE RULES FOCUSING ON BOTH CONDUCT AND EXPRESSION

Applying the vagueness doctrine, the Court in Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972) struck down an antipicketing ordinance while upholding an anti-noise ordinance:

> . . . where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.

As noted above in the discussion of overbreadth, section III(A)(6), p. 107, supra, the vague regulation which on its face touches upon free expression as well as conduct is clearly overbroad as well, and the overbreadth rules should apply. In fact, in some cases, the courts cite only the vagueness doctrine while making a traditional overbreadth argument. E.g., Grayned v. City of Rockford, 408 U.S. 104, 109 (1972); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); Stacy v. Williams, 306 F.Supp. 963 (N.D.Miss. 1969) (three judge court). In Eisner v. Stamford Bd. of Educ., 440 F.2d at 811, the court invalidated a rule requiring prior approval of "distribution of written material." The court cited the vagueness doctrine and specifically held the word "distribution" to be too vague, pointing out that it could apply to mere note-passing. Accord, e.g., Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960, 977 (5th Cir. 1972); see also Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973); Cintron v. State Bd. of Educ., 384 F.Supp. 674 (D.P.R. 1974); Undergraduate Students Ass'n v. Peltason, 367 F.Supp. 1057 (N.D. Ill. 1973).

As is the case with overly broad rules, courts should examine vague statutes which on their face allude to expression more strictly than vague statutes which appear to cover conduct only:

> A higher degree of certainty is required of a statute that has potentially inhibiting effects on free speech.

Corp. of Haverford Col. v. Reeher, 329 F.Supp. 1196, 1202 (E.D.Pa. 1971). After stating this principle, the court determined to apply a stricter test to a statute which required denial of financial assistance to any student —

> . . . Who has been expelled, dismissed or denied enrollment by an approved institution of higher learning for refusal to obey, after the effective date of this act, a lawful regulation or order of any institution of higher education, which refusal, in the opinion of the institution, contributed to a disruption of the activities, administration or classes of such institution; or
>
> . . . Who has been convicted in any court of record of any offense committed in the course of disturbing, interfering with or preventing, or in any attempt to disturb, interfere with or prevent the orderly conduct of the activities, administration or classes of an institution of higher education.

id. at 1204, 1213. These sections were found both vague, id. at 1207-09, and overbroad, id. at 1209-10.

VAGUE RULES FOCUSING ONLY ON CONDUCT

To analyze the federal court treatment of vagueness in rules where the rule does not touch upon first amendment rights, it is useful to distinguish between cases where the students were attempting to exercise a first amendment right, and the attendant conduct was incidental, and cases where the student was engaging primarily in conduct, and the expression was incidental. Where the expression has high emphasis, the courts are inclined to invalidate the rule, either on its face or as applied. Where the conduct is dominant, the courts generally reject the vagueness argument and leave the disciplinary statute or rule undisturbed.

A classic example of the first group of cases -- involving rules which are vague, and do not appear on their face to regulate free expression but which were used to inhibit protected rights -- is found in the case of *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969). A university rule forbidding "misconduct" was applied to discipline students for participating in a demonstration. A court faced with this rule could respond in two ways: first, it could declare the rule unconstitutional as applied to a student engaged in free expression; or it could declare the rule unconstitutionally vague and overbroad on its face. In *Soglin* the court chose the latter alternative, as have most courts faced with this situation. *Accord*, *Sullivan v. Houston Ind. Sch. Dist.*, 307 F.Supp. 1328, 1344-45 (S.D.Tex. 1969), *supplementary injunction ordered*, 333 F.Supp. 1149 (S.D.Tex. 1971), *and vacated*, 475 F.2d 1071 (5th Cir. 1973) (informally approving 307 F.Supp. 1328). The *Sullivan* court voided a rule permitting the school principal to make regulations "necessary in the administration of the school and in promoting its best interests." *Accord*, *e.g.*, *Jacobs v. Board of Sch. Comm'rs*, 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975); *Stacy v. Williams*, 306 F.Supp. 963, 968-78 (N.D.Miss. 1969) (three judge court); *Smith v. University of Tennessee*, 300 F.Supp. 777, 778-79 (E.D.Tenn. 1969); *Snyder v. Board of Trustees of the Univ. of Ill.*, 286 F.Supp. 927 (N.D. Ill 1968) (three judge court).

The courts are generally chary of a request to invalidate a law or regulation when there is no facial invalidity and the student challenging the rule has been subjected to disciplinary proceedings because of conduct. The rule on vagueness applies in these cases nonetheless, and uncertain rules should be struck down, absent circumstances indicating that the student knew for other reasons that the particular conduct would trigger disciplinary procedures.

In *Corp. of Haverford Col. v. Reeher*, 329 F.Supp. 1196 (E.D.Pa. 1971), discussed above, for aspects of the opinion relating to facially infirm rules, the court considered another rule focusing exclusively on conduct. "Because of its more tenuous connection with First Amendment rights," the following section was judged with less rigor, *id.* at 1204, 1213:

> . . . The agency may deny all forms of financial assistance to any student:
>
> . . . Who is convicted by any court of record of a criminal offense which was committed after the effective data of this act, which under the laws of the United States or Pennsylvania, would constitute a misdemeanor involving moral turpitude or a felony . . . .

The court then ruled that a statute which on its face regulates only conduct need not attain the same degree of certainty as a statute which has no potential effects on free speech. Even applying a less rigorous test, however, the court found the section unconstitutionally vague, *id.* at 1205-06, but not overbroad, *id.* at 1209. The Court said, *id.* at 1205-06 (footnotes omitted):

> The allegedly vague segment of this subsection is that which allows PHEAA to deny aid to anyone convicted of a "misdemeanor involving moral turpitude." Defendants rely on the fact that the Supreme Court, in its only pronouncement on the subject, held that the phrase "crime involving moral turpitude" in the Immigration Act of 1917 was not unconstitutionally vague. *Jordan v. De George*, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951). That case is distinguishable from the instant controversy. The Court considered it "significant that the phrase has been part of the immigration laws for more than sixty years." *Id.* at 229, 71 S.Ct. at 707. The Court noted that no case had held the statutory phrase vague and that it had previously construed the phrase. *Id.* at 230, 71 S.Ct. at 703. There is, of course, no such line of cases defining the term "misdemeanor involving moral turpitude" under this statute. More significantly, the majority in *Jordan* seems to have considered the determinative issue to be whether "crime involving moral turpitude" was unconstitutionally uncertain in reference to a particular conviction. In the case at bar, we must consider not whether plaintiffs would be aware that a particular crime involves "moral turpitude," but whether the plaintiffs will be fairly warned as to which misdemeanors involve moral turpitude and thus may occasion the additional sanction of loss of financial aid eligibility.
>
> The different procedural posture of this case from *Jordan* requires us to take this different approach. . . . We do not have before us an individual accused of violating a statute because he has engaged in certain conduct. Plaintiffs here challenge every aspect of the statute. They do not argue that the statute is so vague they could not have known it applied to a particular action. They argue instead that the statute is so vague that they do not know what actions are proscribed.
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> . . . .
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> In determining the extent to which the subject area necessitates verbally imprecise regulation it seems most profitable to look at the ways in which states have regulated similar conduct. An obvious parallel exists between the conduct sought to be deterred by (a) (2) and (a) (3) and disorderly conduct or breach of the peace statutes. As the statute upheld by the Supreme Court in *Zwicker v. Boll*, 391 U.S. 353, 88 S.Ct. 1666, 20 L.Ed.2d 642 (1968), indicates, the state can at least give some description of the conduct it condemns as well as of the consequence to society it seeks to avoid. It would be nearly impossible to itemize every form of conduct which might result in disruption of the peace of the university, but careful draftsmanship can make use of generic and modifying terms to delineate the sort of campus conduct that will not be permitted. . . .
>
> In light of these . . . considerations, we conclude that a substantial potential threat to First Amendment freedoms would result from uncertainty in subsections (a) (2) and (a) (3), that control over the administration of the scheme by the federal courts is not such as would neutralize that possibility, and that the subject matter regulated does not necessitate vague standards of control which leave room for *ad hoc* decisions. Therefore we will apply a strict standard of certainty to these subsections. Because of its more tenuous connection with First Amendment rights, subsection (a) (1) will be measured against less rigorous certainty requirements.

Accord, *Rasche v. Board of Trustees of Univ. of Ill.*, 353 F.Supp. 973 (N.D. Ill. 1972) (three judge court). In *Rasche* the court struck down a United States statute which required a financial aid cutoff to any student who:

> has been convicted by any court of record of any crime . . . and which involved the use of (or assistance to others in the use of) force, disruption, or the seizure of property under control of any institution of higher education to prevent officials or students in such institutions from engaging in their duties or pursuing their studies, and that such crime was of a serious nature and contributed to a substantial disruption of the administration of the institution with respect to which such crime was committed.

The court observed, id., at 976:

> The phrase "crime of a serious nature" does not have a generally understood meaning, is not one commonly used in the law or elsewhere, and can mean different things to different persons. . . . [T]he term . . . is too susceptible of subjective interpretation to fairly advise in advance what in fact a student is forbidden to do. A student has a right to fair warning under the Fourteenth Amendment to our Constitution, and the failure to give this warning violates the First Amendment . . . .
>
> . . .
>
> The other standard of Section 1060(a) challenged by plaintiff is the requirement that the serious crime shall have "contributed to a substantial disruption of the administration of the institution." This provision has two criteria which are either vague, overbroad or both. The first is the requirement that the action which constituted the serious crime "contributed to" a substantial disruption. Must the causal relationship between the action and the disruption be direct and substantial or may it be remote and minute?

The court pointed out, by way of example, that the sit-in which provided the basis for plaintiff's loss of financial aid was found at the disciplinary hearing to have "contributed to" a substantial disruption, despite the fact that the only disruption (closure of a ROTC office) took place one half hour prior to the start of the sit-in. Id. at 977. The court also found the phrase "substantial disruption of the administration of the institution" to be vague.

Both Rasche and Reeher involved student activity which is at least marginally protected--sit-ins and demonstrations, and perhaps should be classified with Soglin and Sullivan as cases where a vague rule regulating conduct was applied to expression. In these cases the courts are generally willing to strike down the rule.

The only other case found where a vague rule clearly regulated conduct alone and was stricken was Crossen v. Fasti, 309 F.Supp. 114 (D.Conn. 1970). The court found "unduly vague, uncertain, and ambiguous" a dress code which required students to be "neatly dressed and groomed, maintaining standards of modesty and good taste conducive to an educational atmosphere." The code added that "it is expected that clothing and grooming not be of an extreme style and fashion."

VAGUE RULES AND DISRUPTIVE CONDUCT

Usually, where the court has characterized the students' activities as disruptive conduct, it has refused to apply the vagueness doctrine. In Esteban v. Central Missouri State Col., 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970), the court reviewed charges of "childish behavior and obscenity toward college officials," lodged against one plaintiff, id. at 1088, and participation in a demonstration against another, id. at 1089, and upheld suspensions of two semesters for each. The college regulation in question was a classic example of imprecision, id. at 1082:

> The conduct of the individual student is an important indication of character and future usefulness in life. It is therefore important that each student maintain the highest standards of integrity, honesty and morality. All students are expected to conform to ordinary and accepted social customs and to conduct themselves at all times and in all places in a manner befitting a student of Central Missouri State College.

The court specifically noted that cases involving free expression could be treated differently. Id. at 1089. The court also cautioned that "[w]e do not hold that any college regulation, however loosely framed, is necessarily valid." In Murray v. West Baton Rouge Sch. Bd., 472 F.2d 438, 442 (5th Cir. 1973), the court refused to apply the vagueness doctrine, "[a]bsent evidence that the broad wording in the statute is, in fact, being used to infringe on First Amendment rights . . . ."

In Sill v. Pennsylvania State Univ., 462 F.2d 463, 468 (3rd Cir. 1972) the court considered vagueness charges against the following regulation:

> . . . Acknowledging that the process of communication may include various forms of individual and collective expression, the University recognizes the right of lawful assembly and demonstration. However, a university dedicated to free inquiry and discussion cannot sanction any interference with or destruction of its responsibilities. The regular and essential operation of the University is construed to include, but is not limited to, the operation of its offices, classrooms, laboratories, research facilities, and the right of access to these and any other physical accommodations used in the performance of the teaching, research, and administrative functions and related adjunct activities of the University.
>
> . . . Disruption is an action or combination of actions by an individual or a group which unreasonably interferes with, hinders, obstructs, or prevents the regular and essential operation of the University or infringes upon the rights of others to freely participate in its programs and services.
>
> . . . It is the responsibility of University officials to initiate action to restrain or prohibit behavior which threatens the purposes or the property of the University or the rights, freedoms, privileges and safety of the personnel of the academic community.

The court held that this "spells out quite clearly and in sufficient detail the conduct which is forbidden." The court distinguished Soglin v. Kauffman, and said, id.:

> We do not have here a situation in which punishment was imposed on students simply on the basis of allegations of misconduct without reference to any preexisting rule which supplied an adequate guide.

In Sill, serious disruption and property damage took place during the period in question, but the court did not review the evidence linking the plaintiffs to the disruption. Rather, it observed only that it was "substantial," without telling us what it was. Some of the students were expelled, others suspended for two terms, and one placed on probation.

The fifth circuit rejected vagueness challenge against a statute which authorized suspensions of "incorrigible" children, Pervis v. La Marque Ind. Sch. Dist., 466 F.2d 1054 (5th Cir. 1972), because another law (the compulsory education law) contained a fuller definition of the word. Id. at 1057.

In Lowery v. Adams, 344 F.Supp. 446 (W.D. Ky. 1972), the court upheld a regulation which stated, id. at 453:

> The University will not allow or tolerate any disruptive or disorderly conduct which interferes with the rights and opportunities of those who attend the University for the purpose for which the University exists--the right to utilize and enjoy the facilities provided to obtain an education.

It is noteworthy, however, that the court indicated agreement with Soglin v. Kauffman that a university may not expel a student for "misconduct." Id. at 454. The students in Lowery were charged with "disorderly conduct" which included forcible entry into an alumni banquet, creating a disturbance there, refusing to leave when requested, resisting the security officer and using vulgar and profane language at the time. See also Whitfield v. Simpson, 312 F.Supp. 889, 896-97 (E.D. Ill. 1970).

VAGUENESS AND ADMINISTRATIVE SANCTIONS

It is quite clear that the vagueness rule applies in a non-criminal context. The Supreme Court addressed the issue squarely in A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239 (1925):

> The ground or principle of the [preceding] decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.

The court declared invalid a section of a federal law attempting to fix prices, in an action between two private parties who were disputing their contractual obligations. Accord, Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118, 123 (1967)(dictum); cf., Baggett v. Bullitt, 377 U.S. 360 (1960).

Nonetheless, it is typical in cases where students who were charged with misconduct (rather than speech violations) for the court to dismiss the rule against vagueness because it is classified as a rule for criminal cases only. See, e.g., Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1004 (5th Cir. 1975)("[S]chool disciplinary regulations need not be drawn with the same precision as are criminal codes."); Black Coalition v. Portland Sch. Dist. No. 1, 484 F.2d 1040, 1044 (9th Cir. 1973) (same); Murray v. West Baton Rouge Sch. Bd., 472 F.2d 438, 442 (5th Cir. 1973) (same); Sill v. Pennsylvania State Univ., 462 F.2d 463 (3rd Cir. 1972) (same); Norton v. Discipline Comm. of E. Tennessee State Univ., 419 F.2d 195, 200 (6th Cir. 1969) (no analogy between student discipline and criminal procedure); Jones v. State Bd. of Educ. of Tenn., 279 F.Supp. 190 (M.D. Tenn. 1968), aff'd without comment on this point, 407 F.2d 834 (6th Cir. 1969) (no analogy between attacks on state statutes and college disciplinary rules), cert. dismissed, 397 U.S. 31 (1970); Speake v. Grantham, 317 F.Supp. 1253, 1272 (S.D. Miss. 1970) (same); Siegel v. Regents of Univ. of Calif., 308 F.Supp. 832, 836 (N.D. Cal. 1970) ("Regulations . . . need not be tested by the strict standards applicable to criminal statutes . . . ."); Esteban v. Central Missouri State Col., 415 F.2d 1077, 1088 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970). Procedures under other civil and criminal statutes were deemed not applicable in Lowery v. Adams, 344 F.Supp. 446 (W.D. Ky. 1972) (citing Jones as the only explanation). All of these cases seem contrary to A.B. Small Co., as quoted above.

In Banks v. Board of Public Instr. of Dade County, 314 F.Supp. 295, 289 (S.D. Fla. 1970) (three judge court), vacated so a fresh appeal could be made, 401 U.S. 988, and aff'd, 420 F.2d 1103 (5th Cir. 1971). The court upheld a Florida state law condemning "willful disobedience, . . .

open defiance of authority . . . [,] profance or obscene language, . . . other serious misconduct, and . . . repeated misconduct of a less serious nature . . . ." The court said, id. at 290:

> The language objected to in the statute, though it might be condemned as constitutionally deficient if included in a criminal statute, does set standards which are readily determinable and easily understood within the framework of the public school system. Individual analysis of the terms is not necessary.

The court upheld the statute, observing generally that rules established there were "not so vague as to require the court to declare them invalid." Id. It is noteworthy that one of the students in this case was suspended for the "possession of marbles." The court alluded to "established rules of which the suspended students had knowledge," id. at 288, but did not quote from any rule barring possession of marbles. Nonetheless, if the court meant what it said, there was some pre-existing regulation which spelled out in greater detail specific acts of misconduct which are not obvious from a reading of the statute alone. This case is discussed more fully in the overbreadth section, III(A)(6), at pp. 107-08, supra.

Other courts have acknowledged the applicability of the vagueness rule to non-criminal situations, but have determined that the standards in the school context should be more flexible. E.g., Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969) ("misconduct" too vague).

A more liberal view was taken by the court in Corp. of Haverford Col. v. Reeher, 329 F.Supp. 1196, 1202-03 (E.D. Pa. 1971). The court held that the severity of expulsion or suspension made it necessary to specify with certainty the acts which would provoke the penalty:

> The potential deterrent effect of the supposed indefiniteness is likewise substantial. The parties here recognized that the potential deterrence will usually be a function of the penalty imposed by the statute, and insisted on arguing at length whether the statute was "penal." While courts have often regarded the civil-criminal distinction as critical in determining the required standard of certainty, see, e.g., Winters v. New York, 333 U.S. 507, 515, 68 S.Ct. 665, 92 L.Ed. 840 (1948), we think the better view is that which finally bases that determination on the seriousness of what is at stake under the statutory scheme. The Third Circuit has adopted the view of Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wis. 1968), aff'd, 418 F.2d 163 (C.A.7, 1969), that expulsion or suspension from school "may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding." Falcone v. Dantinne, 420 F.2d 1157, 1164 (C.A.3, 1969). The loss of financial aid eligibility may have an even more drastic effect than expulsion or suspension, and its deterrent effect on students must be as great as that of many criminal statutes. At the same time, we must recognize that loss of financial aid does not carry the onus of a criminal conviction and may present only a financial hardship. We conclude therefore that the potential deterrent effect of the risk that exercise of protected activity will result in loss of financial aid is substantial; however, it is not so great as it would be if the threatened penalty were criminal conviction resulting in a multi-month imprisonment and/or a stiff fine.

Accord, Jacobs v. Board of Sch. Comm'rs, 490 F.2d 601 (7th Cir. 1973), vacated as moot, 420 U.S. 128 (1975); Marin v. University of Puerto Rico, 377 F.Supp. 613, 623, 626 (D.P.R. 1974); Rasche v. Board of Trustees, 353 F.Supp. 973, 976 (N.D. Ill. 1972).

UNWRITTEN RULES

The unwritten rule, as applied to speech, is discussed in Section III(A)(6), at p. 111 (Overbreadth). As noted the courts tend to be less rigorous when considering vague rules applied to conduct. It should not be surprising, therefore, that courts have indicated that they would tolerate unwritten rules. Thus, the court in Hasson v. Boothby, 318 F.Supp. 1183 (D.Mass. 1970) dismissed a complaint alleging that there was no rule upon which to premise a temporary suspension of plaintiffs from sports participation for drinking beer off school premises and prior to a school dance. The court recognized "[t]he desirability of written rules regulating serious disciplinary offenses and penalties in an academic setting . . . ." Id. at 1186. However, the court accepted the proposition that school authorities could punish students without a prior rule specifically in point under certain circumstances. Id. at 1187-88. However, the court also suggested that, id. at 1188:

> . . . this court believes that the imposition of a severe penalty without a specific promulgated rule might be constitutionally deficient under certain circumstances. What those circumstances are can only be left to the development of the case law in the area. However, at this time the court deems relevant the following factors: (1) prior knowledge of the offending student of the wrongfulness of this conduct and clarity of the public policy involved, (2) potential for a chilling effect on First Amendment rights inherent in the situation, (3) severity of the penalty imposed. Having analyzed the facts of this case in terms of these factors, the court holds that the plaintiff's rights under the due process clause were not violated by the imposition of a one-year probation, subject to review, for the offense of being on school premises with beer on their breaths, even though no prior published rule forbade such conduct.

Accord, Norton v. Discipline Comm. of E. Tenn. State Univ., 419 F.2d 195, 200 (6th Cir. 1969), cert. denied, 399 U.S. 906 (1970) the court found that:

> It was not necessary to have a specific regulation providing for disciplinary action for the circulation of false and inflammatory literature. The University had inherent authority to maintain order and to discipline students.

An identical holding appears in Speake v. Grantham, 317 F.Supp. 1253, 1270 (S.D. Miss. 1970), a case involving the seizure of 200 pamphlets falsely announcing suspension of classes; the court went on to observe that a university may establish standards:

> The notice of these standards may be written or oral, or partly written and partly oral, but preferably written and may be positive or negative in form.

In Speake, rules were published, however, and the court's pronouncements on the unwritten rule are dictum. See also Richards v. Thurston, 424 F.2d 1281, 1282 (1st Cir. 1970) (lack of specific hair regulation not a basis for invalidating discipline of student who knew long hair was barred); Haynes v. Dallas County Jr. Col. Dist., 386 F.Supp. 208, 212 (N.D. Tex. 1974) ("inherent authority;" relevant penal statute consciously ignored by court); Buttny v. Smiley, 281 F.Supp. 280, 286 (D.Col. 1968) ("disciplinary powers . . . need not be entirely bottomed on any published rule . . . .") (dictum); Grossner v. Trustees of Columbia Univ., 287 F.Supp. 535, 552 n. 25 (S.D. N.Y. 1968) (dictum); Barker v. Hardway, 283 F.Supp. 228, 235 (S.D. W.Va. 1968) (school officials have "inherent general power to maintain order") (dictum, as court found specific rules were violated). In Dunmar v. Ailes, 348 F.2d 51, 55 (D.C. Cir. 1965), the court consciously compared the situation to common law crimes and upheld expulsion of a cadet from a United States military academy where a violation was found by,

> . . . a student body entrusted with such matters, second by a board of officers before which Appellant had a full trial-type hearing, third by a reviewing board, fourth by the Superintendent of the Academy, and finally by the Secretary of the Army. We are in no position to find too vague the code thus found applicable.

An analysis which is in greater harmony with the Supreme Court's non-school decisions would strike down the unwritten rule, unless it was clearly a common law crime. See *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1970) (quoted in Part III(A)(6), at p. 111, *supra*); and *Bridges v. California*, 314 U.S. 252, 260-261 (1941).

The better view is expressed by the fifth circuit in *Ingraham v. Wright*, 498 F.2d 248, 268 (5th Cir. 1974)(corporal punishment case). The court held that even if the student concedes that he engaged in conduct, but claims he did not know that particular conduct violated a school rule,

> Inquiry should be made to determine whether the student knew or should have known that his conduct violated school rules or policies. Punishment of any sort would be patently unfair where the student was genuinely unaware of a school regulation, and had no reason to know that he was engaging in conduct which might later be used as a basis for punishment. Cf. St. Ann et al. v. Palisi et al., 5 Cir. 1974, 495 F.2d 423. The publishing of written rules of conduct would obviously eliminate many problems which might arise in this area.

The court also cited an unreported three-judge decision of *Whatley v. Pike County Bd. of Educ.*, Civil No. 977 (N.D. Ga. 1971) which said (quoted at 498 F.2d at 267):

> Where, as here, the pupil was to be promptly corrected for his transgressions, and long-term consequences stemmed only from his refusal to accept his punishment, the flexible elements of due process require only that the student know and understand the rule under which he is to be punished, and that in cases where there is doubt as to the actual offender, further inquiry be made by the school officials concerned.

For additional comments on the unfairness of the unwritten rule see Van Alstyne, *The Student as University Resident*, 45 DENVER L. J. 582, 593 (1968).

SPECIFYING THE SANCTION

The classic vagueness doctrine requires that the rule which forbids the particular conduct must specify what the sanction will be when a breach of the rule occurs. This point is generally overlooked by lower federal courts. An exception is *Soglin v. Kauffman*, 418 F.2d 163, 168 (7th Cir. 1969) where the court struck down a rule prohibiting "misconduct" applied by university officials to expell a student involved in a demonstration:

> . . . The issue here is not the character of the student behavior but the validity of the administrative sanctions. Criminal laws carry their own definitions and penalties and are not enacted to enable a university to suspend or expel the wrongdoer absent a breach of a university's own rule. Nor is "misconduct" necessarily confined to disruptive actions covered by criminal codes. The ability to punish "misconduct" *per se* affords no safeguard against the imposition of disciplinary proceedings overreaching permissible limits and penalizing activities which are free from any taint of impropriety.

Most other courts simply have not addressed this issue. In Sill v. Pennsylvania State Univ., for example, there was no indication that the handbook which contained the rules under which plaintiffs were disciplined (some were expelled) specified any particular sanction for a violation. The point was not discussed by either district or appellate courts. 462 F.2d 463, 467-68 (3rd Cir. 1972), aff'g, 318 F.Supp. 608 (M.D. Pa. 1970). The same was true in Buttny v. Smiley, 281 F.Supp. 280 (D. Col. 1968). Likewise, in Dunn v. Tyler Ind. Sch. Dist., 460 F.2d 137, 143 (5th Cir. 1972) the court upheld an anti-boycott rule which specified that violators would "be subject to automatic suspension." The district court had found that this gave officials unbridled discretion to punish even those engaged in protected activity. The fifth circuit reversed, drawing an analogy to criminal cases where a court imposes less than the maximum penalty allowable under law. Id. at 143.

To summarize, where a vague statute has an obvious potential for intruding upon first amendment rights, courts should and do treat the case in the same way as they treat overbreadth cases. The statute is usually voided. Where a vague statute is cited as grounds for punishment against students who were engaged in conduct which a school could legitimately punish, provided due process is accorded, the court ought to invalidate the statute and the punishment on substantive due process grounds. They should do so because fundamental fairness requires that the state first warn its young citizens that particular acts will evoke serious consequences. This is particularly true where no written rule whatsoever exists; to hold otherwise invites administrators to be capricious and unfair. Yet, a majority of courts have refused to apply the rule against vagueness in a school situation, in the absence of first amendment rights.

For additional cases and analysis of this area, see also Note, Bringing the Vagueness Doctrine on Campus, 80 YALE L.[illegible]. 1261 (1971); Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67 (1960).

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August 15, 1975

III(D)(2) Hair Length

A student's success in challenging a school regulation regarding hair length is in large part dependent upon the jurisdiction in which he resides. Both state and federal courts are divided on the question of review of hair length regulations. Whereas some jurisdictions emphasize the necessity of protecting the student's constitutional rights, other jurisdictions strike the balance in favor of the countervailing school interest, refusing to recognize the inherent rights of students to have long hair. The Supreme Court has not contributed significant insight to the question, continuously denying certiorari. However, the court has agreed to review a case in which a policeman successfully challenged a long hair rule. Since school cases were cited in this opinion, it may provide some guidance. See Dwen v. Barry, 43 U.S. Law Week 3225 (May 27, 1975) (appeal from 483 F.2d 1126) (2d Cir. 1973).

The student's challenge of a hair lenth regulation may be effectively based upon several constitutional theories. Citing the first amendment guarantee of freedom of speech, it could be argued that one's hair length is a means of personal expression which should not be encumbered absent adequate justification. Although the free speech theory is a valid one, it has not received significant acceptance by the courts, even by those which find for the student. The courts' reservations with respect to this argument emanate from the difficulty of equating hair length as a method of expression. In Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), the court held for the student, but rejected the first amendment claim, id. at 1283:

> . . . [W]e reject the notion that plaintiff's hair length is of a sufficiently communicative character to warrant the full protection of the First Amendment. . . . That protection extends to a broad panoply of methods of expression, but as the non-verbal message becomes less distinct, the justification for the substantial protections of the First Amendment becomes more remote.

The Supreme Court upheld a student's right to wear an armband in school as a first amendment right, but also stated in dicta that the case did not relate to regulation of hair style. Tinker v. Des Moines Ind. Com. Sch. Dist., 393 U.S. 503, 507-508 (1969).

More widely accepted than the free speech theory is the argument that regulation of hair length is an arbitrary infringement prohibited by the due process and/or equal protection clause of the fourteenth amendment. Many courts have cited the following first Circuit statement:

> The idea that there are substantive rights protected by the "liberty" assurance of the Due Process Clause is almost too well established to require discussion. Many of the cases have involved rights expressly guaranteed by one or more of the first eight Amendments. But it is clear that the enumeration of certain rights in the Bill of Rights has not been construed by the Court to preclude the existence of other substantive rights implicit in the 'liberty' assurance of the Due Process Clause. . . .

Richards v. Thurston, 424 F.2d 1281, 1284 (1970).

Furthermore, requiring male students to cut their hair while permitting female students to grow theirs as long as they wish is a violation of the Equal Protection guarantee, especially if the state is attempting to base its regulation on health and safety reasons. The equal protection argument has not been cited often in plaintiff's briefs, but has won recognition by at least several federal courts. See, e.g., Crews v. Cloncs, 432 F.2d 1259 1266 (7th Cir. 1970).

Finally, the student is well advised to found his argument on a privacy theory. The Supreme Court has declared:

> [T]he right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'

Griswold v. Connecticut, 381 U.S. 479, 494 (1965). Although the right to determine one's own hair style is not expressly enumerated in the Constitution, the ninth amendment reads as follows:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

It has been on this basis that Justice Douglas has dissented from Supreme Court refusals to grant certiorari in hair lenth cases. See, e.g., Olff v. East Side Union High School, 404 U.S. 1042 (1972). Citing the Griswold decision, Justice Douglas has asserted that the first, fifth, ninth, and fourteenth amendments in combination form a "zone of privacy" into which the state may not trespass. 381 U.S. at 484. Other courts should accept that argument, recognizing that the state must sustain a substantial burden in demonstrating why its interests outweigh the constitutional rights of students.

LIST OF CASES

U.S. CIRCUIT COURTS OF APPEAL

Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970):

Right to wear hair as one wishes protected by the due process clause of the fourteenth Amendment; there is no inherent self-evident justification for the challenged infringement, and the system offered none.

Gere v. Stanley, 453 F.2d 205 (3rd Cir. 1971):

Upheld school regulation; court did not reach the question of whether the right to wear long hair is protected by the Constitution since, in this case, the regulation was not arbitrary even if the right were protected; there was evidence of actual disruption caused by plaintiff's long hair.

Stull v. School Board of Western Beaver Jr.-Sr. High Sch., 459 F.2d 339 (3rd Cir. 1972):

Held for the student; the court addressed the underlying constitutional issue and found that a student's right to govern the length and style of his hair is implicit in the liberty assurance of the Due Process Clause of the Fourteenth Amendment; the school board did not justify the regulation where there was no evidence of disruptions of any kind, or that long hair was hazardous to anyone's health; the court reserved the question of whether the regulation of the length and management of hair could be enforced as condition to taking various shop courses.

Massie v. Henry, 455 F.2d 779 (4th Cir. 1972):

Held for the student; the right to wear long hair is within the right to be secure in one's person under the due Process Clause and there are overlapping equal protection clause considerations; the school administration's justifications based on the need to maintain discipline and safety were not sufficient when there were means to discipline those causing the disruptions and other ways (*i.e.*, hair nets, head bands, etc.) to meet safety considerations.

See also: *Long v. Zopp*, 476 F.2d 180 (4th Cir. 1973)(athletics case, held for student); *Mick v. Sullivan*, 476 F.2d 973 (4th Cir. 1973)(held for student).

Karr v. Schmidt, 460 F.2d 609 (5th Cir.)(*en banc*), *cert. denied*, 409 U.S. 989 (1972):

Held for school; the court (dividing 8 to 7) established a *per se* rule upholding the constitutionality of regulations; a challenger of this type of regulation will have to show it is wholly arbitrary.

Lansdale v. Tyler Jr. Col., 470 F.2d 659 (5th Cir. 1972) (*en banc*), *cert. denied*, 411 U.S. 986 (1973):

Held for student; the court (9-6, with 8 different opinions) limited *Karr*, *supra*, to high school level students or younger; in the absence of unusual conditions, the regulation of hair length is irrelevant to any legitimate college administrative interest, creates an arbitrary classification of students and thus, such regulations are invalid under both the due process and equal protection clauses of the fourteenth amendment.

See also: *Davis v. Firment*, 408 F.2d 1085 (5th Cir. 1969); *Murray v. West Baton Rouge Parish Sch. Bd.*, 472 F.2d 438 (5th Cir. 1973).

Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971):

Held for school; the court found no infringement of a fundamental constitutional right and that such rules were not unreasonable, arbitrary or capricious; the regulation was reasonably related to the maintenance of discipline, promotion of safety in certain courses (industrial arts classes), and "the furtherance of valid educational purposes, including the teaching of grooming, discipline and etiquette."

See also: *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970).

Crews v. Clonce, 432 F.2d 1259 (7th Cir. 1970):

Held for the student; reaffirmed an earlier decision that the right to decide the length of one's own hair is consitutionally protected; it is one of the additional fundamental rights which exist along with the specific ones mentioned in the first eight amendments, and which are protected under the due process clause of the fourteenth amendment; a school has to meet a substantial burden of justification in order to infringe this type of right; here, the court found as insufficient: (1) the evidence that there were actual disruptions in the operation of the school (the school would have to show it was impossible to deter the disruptors, even after taking disciplinary action against them, and (2) health and safety considerations (these objectives could be achieved by narrower rules and besides, girls with long hair were not covered by this rule).

Arnold v. Carpenter, 459 F.2d 939 (7th Cir. 1972):

Held for the student; neither the democratic adoption of a hair code, nor the fact that an exception would be made for a student, if his parents requested it, were sufficient to validate the regulation without the school showing a substantial justification for the rule.

See also: Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970).

Holsapple v. Woods, 500 F.2d 49 (7th Cir.) cert. denied, 419 U.S. 901 (1974):

Held for student; where there is no evidence that the length of the student's hair adversely affected learning experience, and no demonstration of substantial nexus between hair length and disciplinary problems, the right to wear one's hair at any length is protected by the Constitution.

Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971)

Held for the student; the right to govern one's own personal appearance is one of the unspecified freedoms retained by the people and protected by the Constitution under the due process clause of the fourteenth amendment; here, there was no direct evidence that the regulation was necessary to prevent disruptions or unsanitary conditions. Aldrich, J., concurring: "No evidence has been presented that hair is the cause, as distinguished from a possible peripheral consequence, of undesirable traits, or that the school board, Delilah-like, can lop off these characteristics with the locks." 450 F.2d at 1077.

See also: Torvik v. Decoran Community Schools, 453 F.2d 779 (8th Cir. 1972):

King v. Saddleback Jr. Col. Dist., 445 F.2d 932 (9th Cir.), cert. denied, 404 U.S. 979 (1971):

Held for the school; there was no substantial constitutional right involved; the state only had to show that a legitimate state interest was involved and that there was a rational bases for the regulation; despite the lack of evidence of any disruptions in the educational process directly related to long hair, the court was satisfied with the statements of trained, professional teachers that long hair could be distracting in school; this court is willing to leave these rules to the judgment of school officials, as long as they do not unconstitutionally infringe upon the rights of those who must live under their regulations; covers junior college as well as high school students.

Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971),
cert. denied, 405 U.S. 1032 (1972)

Held for the school; a "hair" regulation does not directly and sharply implicate basic consitutional values and, therefore, no cognizable issue is raised for a federal court; "the problem, if it exists, is one for the states and should be handled through state procedures."

See also: *New Rider v. Board of Education*, 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973)

Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974)

Upheld *Freeman* doctrine, but dicta left open the possibility of federal review of "hair" regulations when claims of racial or religious discrimination are involved. See the dissent of Justice Douglas, Marshall concurring, in *New Rider*, 414 U.S. at 1097-1103.

Note: The U.S. Court of Appeals, Second Circuit, has not ruled to date on any cases involving school hair length regulations. Several district courts within that circuit have entertained such cases, however. *E.g. Dunham v. Pulsifer*, 312 F.Supp. 411 (D. Vt. 1970) (held for students in an athletics case); *Crossen v. Fatsi*, 309 F.Supp. 114 (D.Conn. 1970) (held for student because school grooming code was unconstitutionally vague).

STATE CASES HOLDING FOR THE STUDENT

Breese v. Smith, 501 P.2d 159 (Alaska 1972).

Komadina v. Peckham, 13 Arizona App. 498, 478 P.2d 113 (1970).

Meyers v. Arcata Union High Sch. Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (Ct. App. 1969).

Yoo v. Moynihan, 28 Conn. Supp. 375, 262 A.2d 814 (Super. Ct. 1969).

Conyers v. Glenn, 243 So.2d 204 (Fla. 1971).

Murphy v. Pocatello Sch. Dist., 94 Idaho 32, 480 P.2d 878 (1971).

Laine v. Dittman, 175 Ill. App.2d 136, 259 N.E.2d 824 (1970).

Graber v. Kniola, 52 Mich. App. 269, 216 N.W.2d 925 (1974).

In re Vartuli, No. 8297, N.Y. Commissioner Decision, June 21, 1971.

Jacobs v. Benedict, 39 Ohio App. 141, 316 N.E.2d 898 (1973).

Neuhaus v. Federico, 12 Or. App. 314, 505 P.2d 939 (1973).

STATE CASES HOLDING AGAINST THE STUDENT

Pendley v. Mingus Union High Sch. Dist., 109 Ariz. 18, 504 P.2d 919 (1972).

Montalvo v. Madera Unified Sch. Dist., 21 Cal. App. 3d 323, 98 Cal. Rptr. 593 (Ct. App. 1971).

Akin v. Board of Educ., 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (Ct. App. 1968), *cert. denied*, 393 U.S. 1041.

Blaine v. Board of Educ., 210 Kan. 560, 502 P.2d 693 (1972).

Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965).

Shows v. Freedman, 230 So.2d 63 (Miss. 1969).

Kraus v. Board of Educ., 492 S.W.2d 783 (Mo. 1973).

Laucher v. Simpson, 28 Ohio App.2d 195, 57 Ohio Op. 2d 303, 276 N.E.2d 261 (1971).

Smoody v. Washington County Sch. Bd., No. 5362, 5th Jud. Dist., Utah, January, 1975.

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III(D)(3) The Long Arm of the School: Can it be Limited by the Due Process Clause?

While discipline and order are obviously desirable and necessary to the operation of any educational institution, there are forms of discipline and control which go beyond the bounds of anything that would be necessary to maintain order, and in fact probably detract from the educational environment. Sometimes this excessive control by school authorities transgresses no traditional right of students under the first amendment; nor does it violate the equal protection clause of the fourteenth, as all students are treated equally badly. Nor does it violate privacy rights guaranteed by the fourth amendment, or even by the penumbra of the first, fourth, fifth, and ninth amendments. One legal theory still available in this context has already been discussed -- the ultra vires doctrine -- which can serve to invalidate school actions, if they are not authorized by statute. Sometimes, however, a statute authorizes the excess; or it is inconvenient or unwise to take the matter to state courts -- the only proper forum for a direct attack under the ultra vires doctrine, as the state courts are the most qualified to decide whether the state legislature intended to grant the subdivision a particular authority to act. (*Cf.* p. 113, *supra*.) Substantive due process could conceivably serve as an alternative, federal ground for relief in these cases. However, where a specific, identified fundamental right is not at stake students have not fared well.

Examples of the type of case where a school has sought to exercise comprehensive control over students' lives involve 1) requirements that students live on campus, 2) school regulation of off-campus activity, and 3) disciplinary action against a student for conditions beyond the student's control.

DORMITORY LIVING REQUIREMENTS

The on-campus living requirements provide a classic example of overpowering authority of the school. The paternal assumption implicit in such requirements is that the school knows what is best for the student, and may require the student to be present at all times so that he or she can be guided (or controlled) at all times. The already-identified right of privacy should be available to protect students in this situation. The cases are to the contrary, however. Most of these cases rest on an equal protection analysis; however, the close relationship between equal protection and due process has been noted. Where classifications are made on the basis of some characteristic as innocuous as age, a denial of equal protection is rarely significant if no substantive right is involved. See pp. 145-47, supra. Moreover, a few courts have also considered whether there is a substantive right protecting students from on-campus living requirements, and have found none. In Prostrollo v. University of South Dakota, 507 F.2d 775 (8th Cir. 1974), cert. denied, 95 S.Ct. 1687 (1975), the circuit court upheld a university rule requiring all unmarried freshman and sophomores to live in dormitories. Plaintiffs challenged the rule under both the equal protection clause and a right of privacy derived from the due process clause of the fourteenth amendment. The court rejected arguments that a right of privacy was at stake, and found sufficient evidence in the records to sustain a finding that the dormitory requirement was related to a legitimate school interest in assisting younger students in adjusting to college life. Again, in Cooper v. Nix, 496 F.2d 1285 (5th Cir. 1974), where plaintiffs had relied on the equal protection exclusively, the appellate court modified a lower court order which had invalidated a dormitory living requirement applied only to students under age 23. The appellate court observed that the appropriate relief would be to require the school to treat all students alike, that is, to require the school to apply the dormitory living requirement to all students, not just the younger students. The court specifically refused to entertain arguments based on matters which were not contained in defendant's appeal motion. Id. at 1286-87. Thus, the right of privacy was not technically before the court. However, before a court order that all students be denied certain perogatives, it must make an implicit finding that the order does not violate any fundamental right, such as the right to privacy. The existence of a fundamental right would necessitate a stricter review. See pp. 145, 148, supra. The district court apparently had applied strict review, for it had rejected the university's contention that the requirement was designed to provide a broader learning experience for students, noting a lack of evidence that on-campus living actually produced these benefits for students. 343 F.Supp. 1101, 1111-12 (W.D. La. 1972).

Other cases of this type have focused exclusively on equal protection concerns. In one case, the court found sufficient evidence of a good faith concern for the educational and socializing value of on-campus living. Pratz v. Louisiana Polytechnic Inst., 316 F.Supp. 872 (W.D.La. 1970) (three judge court, Ainsworth dissenting), aff'd without opinion, 401 U.S. 1004 (1971). Likewise prior to Pratz, in Lynch v. Savignana, Civil No. 70-375-F (D.Mass. 1970), the court upheld a requirement that all students except commuters live on campus, finding that the college imposed the rule under the assumption that "dormitory living eases adjustment to college life, promotes academic achievement, is cheaper than other alternatives, and facilitates provision for health and emergency services." Following Pratz, in Poynter v. Drevdahl, 359 F.Supp. 1137 (W.D.Mich. 1972) the court upheld a requirement that single undergraduate students -- except those 23 or over, those living with parents or legal guardians, and those excused for hardship reasons -- must reside at a university dormitory. The court accepted the university's uncontroverted affidavit stating that the rule was based in part on the university's desire "to create an environment in which students can live and work together in a community of scholarship" and granted summary judgment for the school. Id. at 1141, 1144. Counsel for plaintiff, in fact, conceded that "there may be some educational benefit from dormitory living." Id. at 1142. See also Prostrollo v. University of South Dakota; Cooper v. Nix, discussed above.

In sum, whether a substantive right to privacy or equal protection rights are asserted, the courts have fairly uniformly accepted as sufficient justification for a rule a university's desire to broaden the educational experience of the student. On the other hand, a justification based on fiscal considerations alone has not been viewed cordially. In Mollere v. Southeastern Louisiana Col., 304 F.Supp. 826 (E.D.La. 1969), the court struck down a rule requiring unmarried women under 21 and freshmen men to live in dormitories. The university's only rationale was financial -- it needed to fill its dormitories in order to meet financial commitments. This was also the view taken by the lower courts in Cooper v. Nix, 343 F.Supp. 1101 (W.D.La. 1972) and Prostrollo v. University of South Dakota, 369 F.Supp. 778 (D.S.D. 1974). In Prostrollo the circuit court found adequate evidence of other, valid purposes (educational purposes), but it did not specifically overrule the lower court's holding that financial reasons would be insufficient. The appellate court in Cooper v. Nix merely modified the trial court's order to require the same treatment of all students, so it left undisturbed the holding that financial justifications do not justify unequal treatment.

Thus, no court has directly accepted the financial rationale as a justification for dormitory requirements. One court, which decided the case before it on another basis, remarked only that it saw nothing "sinister" in such requirement and indicated that it considered "legitimate" the school's "interest . . . in insuring its mandatory obligation to honor it bonded indebtedness." Poynter v. Drevdahl, 359 F.Supp. 1137 (W.D.Mich. 1972).

Even if courts are willing to reject financial reasons as justification of a dormitory requirement, it is relatively easy for the school to establish valid, educational reasons. The mere assertion of the university's president that the school desired to promote "personal and social development" seemed to satisfy the eighth circuit. See Prostrollo, 369 F.Supp. at 781 (a review of the evidence) and the circuit court opinion at 507 F.2d 775.

Finally, even if courts permit a school to compel students to live on campus, there are limits on the school's authority to oversee students' lives. See White v. Davis, 13 Cal. 3rd 757, 120 Cal. Rptr. 94, 533 P.2d 222 (Cal. S.Ct. 1975). The court upheld plaintiffs' suit, against a demurrer by defendants, where plaintiffs had alleged a police spy operation taking place on campus. The court relied primarily on plaintiffs' free speech rights, pointing out that the knowledge that confidants at student gatherings might be under cover police agents would have a chilling effect on free speech and association. See p. 30, supra.

REGULATION OF OFF-CAMPUS ACTIVITY

In a second line of cases where students have challenged the long arm of the school, they have fared even less well. These cases involve school disciplinary rules which extend to off-campus activities. (The parallel cases brought in state court on an ultra vires theory have fared better. See supra pp. 11-12.) Under a due process theory, courts have been reluctant to interfere with school decisions, in the absence of an identifiable and well-established right. In contrast, in The Student as University Resident, 45 DENV. L.J. 582 (1968) Professor Van Alstyne assumes, when describing even the most restrictive view of college authority over students, that it does not extend beyond the campus. Id. at 583, 584, 585. Additionally, he points out the problems of double jeopardy faced by a student who is subject to punishment in the hands of school officials as well as governmental. Id. at 598-603. Cf., Waller v. Florida, 397 U.S. 914 (1970) (punishment by city and state for same act violated double jeopardy).

In one group of cases of this type, the university expelled or suspended a student for his or her involvement in an illegal or disorderly demonstration taking place off campus. Usually the fact that the university was disciplining a student for off-campus activity was mentioned only as background; there apparently were no direct attacks by students on substantive due process grounds. Thus, these cases have focused exclusively on procedural due process questions. See, e.g., Due v. Florida Agricultural and Mechanical Univ., 233 F.Supp. 396, 402 (N.D. Fla. 1963); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961); Knight v. State Bd. of Educ., 200 F.Supp. 174 (M.D. Tenn. 1961).

In Due the court upheld a suspension based upon a contempt of court citation. In Knight the court approved the university's rule requiring expulsion of students following their convictions for "disorderly conduct" which took place off campus. In Dixon the students were disciplined under a rule permitting expulsions for off-campus lunch counter sit-ins. In all of these cases, there was no direct attack based on the students' rights to be free of university regulation when off campus.

See also Jones v. State Bd. of Educ., 407 F.2d 834, 835 (6th Cir. 1969), writ of cert. dismissed as improvidently granted, 397 U.S. 31 (1970) (Douglas and Brennan dissenting). The court upheld the suspension of a student, based upon, among other items, a charge that he was arrested and found off campus in bed with a woman. The court found that the publicity connected with the incident "tainted the reputation" of the school and other students. The student had a record of on-campus violations as well, so this case is not exclusively one involving off-campus activity, and neither the trial nor the appellate courts discussed the substantive due process questions. See also Cornette v. Aldridge, 408 S.W.2d 935 (Ct.Civ. App. Tex. 1966) (permitting expulsion of a student for off-campus speeding; on-campus speeding also involved); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-supported Institutions of Higher Education 45 F.R.D. 133, 145 (W.D.Mo. 1968) (en banc memorandum) ("Standards . . . may apply to student behavior on and off the campus when relevant to any lawful mission . . . .").

As noted in this discussion, students fare better if they are able to assert an already established and identified right. The right to privacy and in addition, a right to be free from double jeopardy, seem relevant in the cases of disciplinary action for off-campus acts, but the plaintiffs in the cases cited above apparently failed to raise these issues, and the courts failed to take independent cognizance of them.

There are some signs that courts are beginning to recognize the basic unfairness of school punishment for acts which are essentially outside of the school's jurisdiction. Thus, in *Taylor v. Grisham*, Civil No. A-75-CA-13 (W.D.Tex., Feb. 24, 1975) (Clearinghouse No. 1[illegible],925), the court entered a preliminary order, based on substantive due process grounds, reinstating a student who had been suspended because of marijuana use off school premises. The court's holding was narrow, however, mem. op. at 5:

> We certainly do not intimate that a student's off-campus use of marijuana during school hours is totally outside the legitimate interest of school authorities. What is obvious, however, is that the decision to suspend Plaintiff was not based upon a consideration of the legitimate interests at stake. All parties agree that no evidence exists that Plaintiff ever possessed or used marijuana at school or during the course of school-related activities. All parties agree that no evidence exists that Plaintiff ever influenced other students to use marijuana or other drugs or narcotics. All parties agree that the decision to discipline Plaintiff was not based upon any threatened or previous disruption of the educational functions of the Round Rock Independent School District. The regulation under which Plaintiff was suspended required no relationship between the offense charged and the legitimate interests of the school system. The principal, superintendent and School Board members, likewise, failed to limit their consideration to matters within their legitimate official concern in determining Plaintiff's guilt and in assessing punishment. This is less than due process of law.

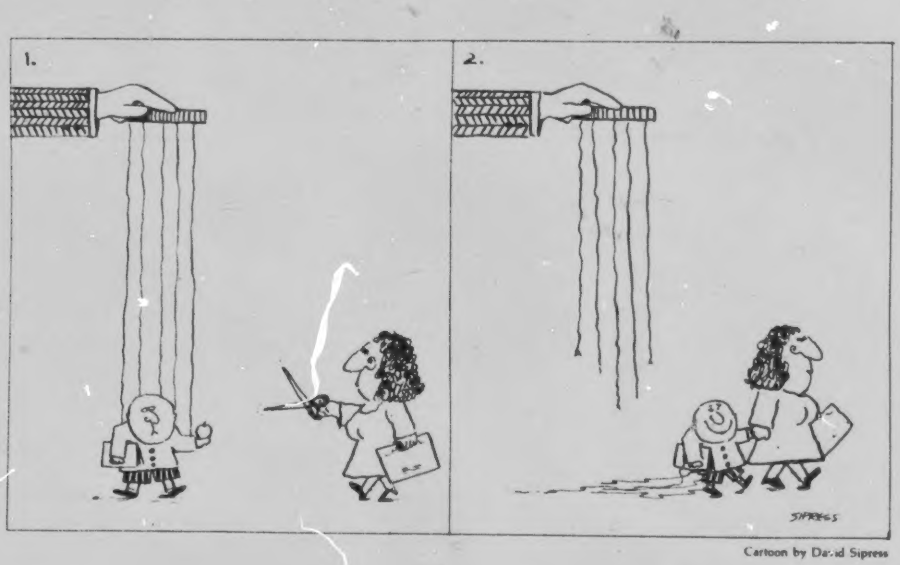
Of course, where the off-campus activity involves a clearly recognized right, the court would virtually be compelled to invalidate the school's attempt to regulate. See *Sullivan v. Ind. Sch. Dist.*, 307 F.Supp. 1328 (S.D.Tex. 1969), *supplementary injunction ordered*, 333 F.Supp. 1149 (S.D. Tex. 1971) *and vacated*, 475 F.2d 1071 (5th Cir. 1973) (3[illegible].Supp. 1328 informally approved), *cert. denied*, 414 U.S. 1032 (1973). Notably, in such cases court rulings are limited to rules for on-campus distribution. See, *e.g.*, *Jacobs v. Board of Sch. Comm'rs*, 490 F.2d 601 (7th Cir. 1973), *vacated as moot*, 420 U.S. 128 (1975) (Douglas, dissenting); *Vail v. Board of Educ.*, 354 F.Supp. 592 (D.N.H. 1973), *remanded for fuller relief*, 502 F.2d 1159 (1st Cir. 1973).

PUNISHMENT FOR CONDITIONS BEYOND STUDENT'S CONTROL

A final group of cases which appear to rest on substantive due process grounds are those in which the court has forbidden the school to punish a student for acts or conditions which are beyond the student's voluntary control. In a non-school Supreme Court case, *Robinson v. California*, 370 U.S. 660 (1962), the Court prevented the state of California from making the "status" of narcotic addiction, primarily because of the basic unfairness of punishing a person for status which he or she could not voluntarily change. There are no school cases directly parallel to *Robinson*. However, it was recognized in *Taylor v. Grisham*, that a school could constitutionally "separate" a student who was likely to try to influence other students to use drugs. Mem. op. at 4. See also *Paine v. Board of Regents*, 355 F.Supp. 199, 204 (W.D.Tex. 1972), *aff'd per curiam*, 474 F.2d 1387 (5th Cir. 1973), and discussion at p. 170, *supra*.

Another type of case illustrates the applicability of this rule to the school situation. In St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974) the appellate court ruled that a school could not suspend two children because of their parent's acts. The mother had gone to school to inquire about a son's suspension, and during the discussion with the assistant principal, she struck him. Thereafter, her two children were indefinitely suspended. The fifth circuit recognized that there are "fundamental concepts of justice which lie at the base of our civil and political institutions," citing cases such as Griswold v. Connecticut, 381 U.S. 479 (1965) and Shapiro v. Thompson, 394 U.S. 618 (1969) (see pp. 188-89, supra.) It then found that among these fundamental concepts was a principle that personal guilt must be present before a person could be punished. 495 F.2d at 426.

P. M. Lines
Center for Law and Education
Sept. 15, 1975



Cartoon by David Sipress

IV.

Procedural Due Process

IV. Procedural Due Process

The preceding section of this manual deals primarily with those situations where we believe that students should not be disciplined. There are many situations, however, where students should be disciplined -- firmly, fairly and hopefully, with a wisdom which imparts a lesson in good citizenship. The disciplinary procedures -- from the making of the rules for which the student is to be disciplined to the execution of the punishment -- should be intelligible and rational to the student. Ideally, disciplinary machinery appears fair to the student because it is fair and when the student sees a mistake has been made by this machinery, it is accepted as a rare accident and not a matter of course. In short, every educational institution has a noble opportunity to instruct students not only in the classroom, but in its other relationship with these students as well.

This note will discuss the requirements of fairness which inhere in the due process clause of the United States Constitution, as interpreted by the federal courts, in school discipline cases. The fourteenth amendment stipulates only the broadest kind of requirement:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

This clause does not define "liberty," "property" nor "due process," and it has become the task of the courts to flesh out their meanings. The combined concepts of "life, liberty, or property" have not been specifically discussed very often, but it is clear from Goss and other decisions that suspension, expulsion and corporal punishment (if permitted at all) are deprivations of "life, liberty, or property." Forms of punishment which are deployed less frequently -- disciplinary transfers to another school, academic sanctions for disciplinary infractions (lowered grades, withheld diplomas) -- are usually specifically discussed and treated as sufficiently serious deprivations of liberty or property that they also trigger "due process of law."

Ironically those punishments which are used most often, and which the courts silently accept as a deprivation of liberty (or perhaps property) in fact could be perceived by a rebellious student as a grant of liberty: The student is told to stay away from the school for a period of time, or perhaps forever, while peers are compelled by state law to continue to go there, day after day, until they reach the appropriate age when the state's compulsory education law no longer applies to them.

In any case, it is first necessary to determine what sanctions will be the equivalent of a deprivation of "life, liberty or property," to the extent that they will trigger due process of law.[1] The second task concerns the definition of "due process". Thus, this note first outlines the types of sanctions which trigger due process, and then discusses the procedures that should be followed. Since the procedures are informal or elaborate according to the seriousness of the punishment, there is also some discussion here on how the courts appear to be classifying punishment -- which can range from detention after school for a few minutes to total expulsion from school. The first section also considers briefly the applicability of Goss to non-disciplinary sanctions.

REMOVAL FROM SCHOOL OF OTHER SERIOUS PUNISHMENT CONSTITUTES DENIAL OF LIBERTY OR PROPERTY

DISCIPLINARY CASES

The basic premise that some process must be followed before a student is suspended or expelled is founded on a number of truisms about the importance of education. Thus in Goss v. Lopez, 419 U.S. 565 (1975), the Court had to make an initial determination on whether a 10-day suspension was a denial of liberty or property within the meaning of the due process clause. In deciding affirmatively, the Court found that the sanction deprived students of a statutory right to have a free education, noting also that the state made education available to all young citizens. (In Ohio there is no constitutional right, as is true in most other states.) Id. at 573. The Court additionally recognized a substantial interest in education, characterizing it at one point as a "property interest." Id. at 576. Finally, the Court found a denial of "life, liberty or property" in the injury to reputation which necessarily occurs when a student is punished for misconduct. Each of these interests is discussed more fully below.

First, the Court compared the statutory right to education in Ohio to statutory rights in other cases where it had accorded adults procedural due process, citing the right to continued employment by the state in the absence of a sufficient cause for discharge, Connell v. Higginbotham, 403 U.S. 207 (1971); Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952); Arnett v. Kennedy, 416 U.S.

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1. For a case involving the right of a non-student to be present on a university campus until there is a hearing on the validity of an order barring him, see Dunkel v. Elkins, 325 F.Supp. 1235 (D. Md. 1971).

134 (1974); the right to welfare payments if qualified, Goldberg v. Kelly, 397 U.S. 254 (1970); -- the right to parole unless there is a valid reasons to revoke it, Morrissey v. Brewer, 408 U.S. 471 (1972); and the right to accumulate good-time credits under state law, Wolff v. McDonald, 418 U.S. 539 (1974). 419 U.S. at 572. It found the right granted by statute to be enough to trigger the requirements of due process.

But the Court in Goss did not stop at statutory entitlement. It went on to find independent reasons why due process was required -- and these reasons are also relevant to disciplinary sanctions which do not require deprivation of the right to be in the classroom.

In addition to the right originating in Ohio's educational laws, the Court found that students had a substantial enough interest in education, in and of itself, that a temporary denial of schooling would require due process. Thus, the Court rejected the notion that it would have to first find a fundamental right to education. (The Court had rejected the existence of a fundamental right in San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).) The Goss Court cited the oft-cited statement by Justice Warren in Brown v. Board of Educ., 347 U.S. 483, 493 (1954) that " . . . education is perhaps the most important function of state and local governments." 419 U.S. at 576. The complete passage in Brown continues as follows, id.:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

The Brown precept had already been adopted wholeheartedly in school discipline cases in lower courts. See also e.g., Williams v. Dade County Sch. Bd., 441 F.2d 299, 302 (5th Cir. 1971)(quoting Dixon); Hosier v. Evans, 314 F.Supp. 316, 319 (D.St.Croix 1970); Ordway v. Hargraves, 323 F.Supp. 1155, 1158 (D.Mass. 1971); Vail v. Board of Educ., 354 F.Supp. 592 (D.N.H. 1973), remanded for additional relief on other issues, 502 F.2d 1159 (1st Cir. 1973).

The recognition of this substantial interest -- which the Goss court at one point characterizes as a "property interest", id. at 576 -- would extend the Goss requirement of due process to other forms of punishment which would deny the student continued enjoyment of some educational opportunity -- access to a particular course, detention in study hall or the principal's office during regular classroom hours, and disqualification from extracurricular educational activities as a punishment. It also extends Goss to suspensions from state-operated institutions of higher education, where the state statutory and constitutional rights to education do not normally apply. See e.g., Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (involving dismissals from tax-supported college):

> It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.

The Goss court also cited Board of Regents v. Roth, 408 U.S. 564, 573 (1972). Id. Roth involved the right of a university teacher to a hearing upon a negative decision on contract renewal. The Court found no property interest, and reversed and remanded summary judgment for Roth. Compare with Sindermann v. Perry, 408 U.S. 593 (1972), where the Court granted relief to a teacher who faced non-renewal of a contract after 10 years of teaching. Although Sindermann, like Roth, was non-tenured, the Court felt that implied contractual rights were possible. Id. at 601-02. The Court affirmed the court of appeals which desired to remand the case for trial. Reading Roth, Sindermann and Goss together, one must conclude that in any exclusion or dismissal where there is a reasonable expectation that the benefit will be made available (as in the case, for example, of students who exceed the mandatory age for compulsory education), it cannot be denied without due process.

As a third basis for finding a deprivation of "life, liberty or property," the Goss court also briefly recognized the potentially damaging effects that the disciplinary process may have on the student's reputation, status and permanent record, id. at 574-75:

> School Authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.

The Goss court (at 574) cited the case which first raised the issue of stigma and due process, Wisconsin v. Constantineau, 400 U.S. 433 (1971), where the Court found unconstitutional a state statute which allowed law enforcement officers to post notices in liquor stores and bars instructing the proprietors not to sell liquor to persons they believed alcoholic. The Court noted that before attaching this "label" to an individual -- which was to some, but not all, people "a stigma or badge of disgrace" -- procedural due process had to be followed, and a full adversary hearing held. This analysis provides an independent ground for requiring a hearing in cases not involving exclusion from schooling -- reduction of grades, disciplinary transfer or corporal punishment, for example. The implications of this are discussed below.

DISCIPLINARY SANCTIONS NOT INVOLVING ABSENCE FROM CLASS

While the property interest in education clearly protects students from a denial of this interest through exclusion from school -- temporary or permanent -- there are numerous other serious sanctions which do not require such exclusion. The third basis for finding an interest sufficiently important to trigger due process was the interest in reputation. This interest should extend due process protection to students who are disciplined in other ways -- e.g., corporal punishment (if allowed at all), academic sanctions, (there may also be a property interest in grades), and disciplinary transfers.

Goss would seem to modify, at least in part, *Madera v. Board of Educ. of New York City*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968), where the second circuit viewed a disciplinary transfer as minimal and not requiring a right to counsel or other relatively formal procedures. Prior to *Goss*, other courts frequently found disciplinary transfers sufficiently serious to trigger due process, but usually the transfer was to a program which was inadequate compared to the regular school program and could therefore be equated with a suspension or expulsion. See, *e.g.*, *R.R. v. Board of Educ. of Shore Regional High Sch. Dist.*, 263 A.2d 180 (N.J. Super.Ct. 1970) (hearing required prior to transfer to home instruction); *Betts v. Board of Educ. of Chicago*, 466 F.2d 629 (7th Cir. 1972) (hearing required prior to transfer to program which gave no academic credit; held requirement satisfied); *Jordan v. School Dist. of Erie*, Pa., Civil No. 34-73 (W.D.Pa., Feb. 5, 1974) (order and consent decree requiring hearing prior to transfer to another school which could refuse to admit the student); *Hobson v. Bailey*, 309 F.Supp. 1393, 1402, 1403 (W.D.Tenn. 1970) (approximately three weeks suspension plus disciplinary transfer).

Cases prior to *Goss* which granted a right to a hearing based on the stigma attached to this action include *Warren v. Nat'l Ass'n of Secondary Sch. Principals*, 375 F.Supp. 1043 (N.D.Tex. 1974) (dismissal from an honor society); *Ector County Ind. Sch. Dist. v. Hopkins*, 518 S.W.2d 576 (Tex. App. Ct. 1974) (same). *Cf. Bates v. Costanzo*, Civil No. 75-11-70 (E.D.Pa. April 23, 1975) (preliminary relief denied when school agreed to grant hearing prior to disciplinary transfer).

Property interests may also be involved in some sanctions which do not exclude the student from class. Thus, prior to *Goss*, the lower courts have granted a right to a hearing where the student was denied continued enjoyment, for disciplinary reasons, of some extra-curricular activity which could prove valuable to the student as a property interest. See *e.g.*, *Kelley v. Metropolitan County Bd. of Educ. of Nashville*, 293 F.Supp. 485 (M.D.Tenn. 1968) (athletic program suspended for one year, court found that this could harm athletes' chances of obtaining scholarships; and school should receive hearing); *Behagen v. Intercollegiate Conf. of Faculty Rep.*, 346 F.Supp. 602 (D.Minn. 1972)(requiring hearing for suspension from athletic practice; but permitting emergency suspension from games to be held only so long as possibility or brawls continued, or college could prepare for a hearing.) *Cf. Lee v. Florida High Sch. Activities Ass'n*, 291 So.2d 636 (Fla. App. Ct. 1974) (non-disciplinary denial of participation in athletic program because of number of years already participated held to state cause of action). But see *Dallam v. Cumberland Valley Sch. Dist.*, 391 F.Supp. 358 (M.D. Pa. 1975) (post-*Goss* case finding no constitutionally protected property interest in athletic participation by non-resident student attending defendant school); *Taylor v. Alabama High Sch. Athletic Ass'n*, 336 F.Supp. 54 (M.D. Ala. 1972)(no special interest in sports participation). See also, *cf. Mitchell v. Louisiana High Sch. Athletic Ass'n*, 430 F.2d 1155 (5th Cir. 1970)(academic standards approved; no special interest in continuing in athletic program); *Parish v. NCAA*, 361 F.Supp. 1220 (W.D. La. 1973), *aff'd*, 506 F.2d 1028 (5th Cir. 1975) (same).

Academic sanctions without due process were condemned in *Goldwyn v. Allen*, 54 Misc.2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967) where the state department of education barred a student from participating in the Board of Regents examination which had to be taken before a state diploma could be received, and before most colleges and universities in the state would grant him admission.

The decision had been made on the basis of a letter from the acting principal at the student's school informing the state department that the student had cheated on an examination. In a subsequent review by an assistant district superintendent, the student was not permitted to have counsel participate. The court found the denial of the opportunity to take the examination a serious sanction and found the hearing deficient. See also Part V (D), at pp. 339-42, _infra_.

NON-DISCIPLINARY EXCLUSIONS

As noted, _Goss_ found the statutory entitlement sufficient to trigger due process. Since all states have compulsory education laws and a good number have constitutional provisions guaranteeing young citizens a right to education, the statutory right would be sufficient to make _Goss_ applicable to _any_ dismissal from any public school anywhere. Thus, any sanction which requires the removal of a student from the classroom triggers some requirement of due process, however rudimentary. The statutory right could be used, for example, to secure procedural due process for children who are excluded for academic failure, poor health, physical handicaps, pregnancy or other non-disciplinary reasons. See generally, CENTER FOR LAW AND EDUCATION, CLASSIFICATIONS MATERIALS (Revised ed., Sept. 1973); Weckstein, _The Supreme Court and the Daily Life of Schools: Implications of Goss v. Lopez_, 20 INEQUALITY IN EDUC. 47 (July, 1974); McClung, _The Problem of the Due Process Exclusion_, 35 LAW & EDUC. 491 (1973), also printed in CLASSIFICATION MATERIALS at 155. Cases involving non-disciplinary dismissals and exclusions are discussed briefly below. Especially note _Mills v. Board of Educ. of District of Columbia_, 348 F.Supp. 866 (D.D.C. 1972) ("exceptional" children, children with behavior problems, etc. entitled to hearing).

Prior to _Goss_, the courts had fairly consistently required no more than notice of the reasons for dismissal in cases of academic failure. See, _e.g._, _Gaspar v. Bruton_, 513 F.2d 843, 851 (10th Cir. 1975); _Connelly v. Univ. of Vermont and State Agr. Col._, 244 F.Supp. 156, 159 (D Vt. 1965). To the extent that _Board of Regents v. Roth_, 408 U.S. 564 (1972)(teacher nonrenewal) and _Goss v. Lopez_, 419 U.S. 565 (1975) would require a hearing wherever a property right is denied, and recognize a property right in school attendance, some procedural requirements are necessary. However, the greater discretion typically entrusted by law to school officials in matters of academic standards distinguish such dismissals from the disciplinary cases. To the extent that the type of controversy likely to appear in academic dismissals is different from that likely to appear in disciplinary dismissals, a different set of rules may apply. This is not to say that an argument for a hearing cannot be made in case of academic dismissal. The court in _Gaspar v. Bruton_ acknowledged the relevance of _Goss_, for example. _Goss_ and _Roth_ could provide a basis for a fuller hearing where unusual circumstances also attend the decision to dismiss the student for academic reasons. Thus, when a school not only dismissed a student for acadmic failure, but also notified outsiders that he lacked "intellectual ability," the eighth circuit has held that minimal procedures are required. _Greenhill v. Bailey_, 519 F.2d 5 (8th Cir. 1975).

GREATER AND LESSER DEPRIVATIONS OF LIFE, LIBERTY AND PROPERTY

Implicit in all judicial pronouncements on school disciplinary procedures, and explicit in some, is the principle that there is a range of sanctions available to school authorities and the more severe will trigger more formal hearings while the less severe will trigger less formal hearings, or perhaps none.

School discipline cases which make this explicit include, for example, Pervis v. LaMarque Ind. Dist., 466 F.2d 1054, 1057 (5th Cir. 1972):

> . . . the quantum and quality of procedural due process to be afforded a student varies with the seriousness of the punishment to be imposed.

and Farrell v. Joel, 437 F.2d 160, 162 (2d Cir. 1971):

> We believe that in these school discipline cases, the nature of the sanction affects the validity of the procedure used in imposing it. . . . Expulsion would be at one extreme. Near the end of the other might be a penalty of staying after school for one hour . . . .

Accord, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1961); Lopez v. Williams, 372 F.Supp. 1279, 1301 (S.D. Ohio 1973), aff'd sub nom., Goss v. Lopez, 419 U.S. 565 (1975).

But recognizing the necessity of determining whether a punishment is severe or mild, and consequently whether it will trigger formal or less formal procedural requirements by no means helps in deciding how to make that determination. What, for example, makes a ten-day suspension less serious than an 11-day suspension? While the courts have recognized the legitimacy of differing procedures dependent solely on the number of days a student will be required to leave school, the disciplinary decisions have cast very little light on how to make such a decision.

Prior to Goss only a small minority of courts had required any kind of abbreviated procedures for short-term suspensions. E.g., Vail v. Board of Educ., 354 F.Supp. 592, 603 (D.N.H. 1973), remanded for additional relief on other issues, 502 F.2d 1159 (1st Cir. 1973) (informal consultation required in suspensions of five days or less); see also Gardenhire v. Chalmers, 326 F.Supp. 1200, 1205 (D.Kan. 1971); Stricklin v. Regents, 297 F.Supp. 416, 420 (W.D. Wis. 1969), appeal dismissed as moot, 420 F.2d 1257 (7th Cir. 1970); Mellow v. School Comm. of New Bedford, Civil No. 72-1146-F (D.Mass., Apr. 6, 1972)(preliminary injunction), commented on in Lines, The Case Against Short Suspensions, 12 INEQUALITY IN EDUC. 39, 42 (1972).

In contrast, the vast majority of federal courts had distinguished between long and short term suspensions, and had applied the due process principles only to longer term suspensions and expulsions. Although accepting the high importance of education recognized in Brown v. Board of Education (quoted at p. 219 supra), the courts often found that a short term denial of this interest was de minimus and raised no constitutional problem. Thus, prior to Goss, many lower courts were concentrating on developing a cut-off point between short term suspensions where no hearing would be required, and long-term suspensions. The number of days courts would tolerate in the absence of any process varied according to the jurisdiction and was set at from two to 15 days. See *e.g. Sweet v. Childs*, 507 F.2d 675 (5th Cir. 1975); *Linwood v. Board of Educ.*, 463 F.2d 763 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972) (seven days); *Tate v. Board of Educ.*, 453 F.2d 975 (8th Cir. 1972) (three days); *Sullivan v. Houston Indep. Sch. Dist.*, 307 F.Supp. 1328 (S.D.Tex. 1969) (three days), *decree expanded in* 333 F.Supp. 1149 (S.D. Tex. 1971), *rev'd on other grounds and aff'd on this point*, 475 F.2d 1075 (5th Cir. 1973); *Black Students of North Fort Meyers Jr.-Sr. High School ex rel. Shoemaker v. Williams*, 335 F.Supp. 820 (M.D. Fla.), *aff'd*, 470 F.2d 957 (5th Cir. 1972)(some number less than ten); *Williams v. Dade County Sch. Bd.*, 441 F.2d 229 (5th Cir. 1971) (ten days, insubstantial; 40 days, substantial); *Graham v. Knutzen*, 351 F.Supp. 881, 884-85 (D.Neb. 1973) (a "reasonable" time); *Mills v. Board of Educ.*, 348 F.Supp. 866-878 (D.D.C. 1972) (two days); *Baker v. Downey City Board of Educ.*, 307 F.Supp. 517 (C.D. Cal. 1969) (ten days); *Farrell v. Joel*, 437 F.2d 160 (2d Cir. 1971) (ten or 15 days or more). These decisions are now modified by *Goss*, to the extent that *Goss* requires an abbreviated hearing for short suspensions, 419 U.S. at 576:

> A 10-day suspension from school is not *de minimus* in our view and may not be imposed in complete disregard of the Due Process Clause.

Goss strongly suggests, but does not make explicit, that its holding applies to all short-term suspensions, even those of less than one day. It also states that suspensions beyond ten days "may require more formal procedures." *Id.* at 584. It is still possible, therefore, for some lower courts to decide that very short suspensions of just one or two days require no hearing, and suspensions beyond ten days may also follow the minimal requirements of *Goss*, rather than a more formal hearing. It is noteworthy that in his dissent, Justice Powell interpreted the majority opinion to require rudimentary process in routine suspensions of only one day. *Goss v. Lopez*, 419 U.S. 565, 585 (1975). See also Powell's dissent in *Wood v. Strickland*, 420 U.S. 308, 329 (1975). It is most likely that the fact situation in *Goss* will lead school officials and the courts to the adoption of a single ten-day rule, requiring the informal *Goss* procedure for short-term suspensions up to and including ten days and more formal requirements for long-term suspensions.

However, the analysis does not end upon agreeing on the cut-off point. *Goss* is even more complicated than this, 419 U.S. at 584:

> We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

Recognizing that there may be many "unusual situations" where "something more than the rudimentary procedures will be required," this note discusses the procedures required in four types of suspensions: 1) the usual short-term suspension of up to ten days; 2) the short-term suspension accompanied by unusual circumstances; 3) the longer term suspension and expulsion, and 4) the emergency suspension.

SHORT TERM SUSPENSIONS -- NO UNUSUAL CIRCUMSTANCES

For the fact situation before it -- a routine 10-day suspension -- the *Goss* Court set forth the following basic rules, 419 U.S. at 581:

> . . . [D]ue process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusions from school.

On the question of timing the Court observed, *id*. at 582:

> Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school.

Thus a prior hearing is required, but there is some ambiguity, as both the trial court and the Supreme Court consistently referred to the infirmity in procedure as the failure to permit a hearing "prior to suspension or within a reasonable time thereafter." 372 F.Supp. at 1302; 419 U.S. at 567, and left room for argument that in some of the cases a "reasonable time thereafter" may have been permissible on the facts before it. In a footnote, for example, the Supreme Court noted that the lower court had also declared the statute unconstitutional because it permitted "suspension without *first* affording the student due process of law." The footnote observes that the opinion below nonetheless contained "language . . . which expressly contemplates that under some circumstances students may properly be removed from school before a hearing is held, so long as the hearing follows promptly." *Id*. at n. 6. The Court then expressly held that the prior hearing requirement may not apply to students whose presence poses a continuing threat to persons or property or of disruption of the academic process may be removed immediately, with notice and hearing to follow "as soon as practicable." *Id*. at 581-82.

The correct reading of the words "prior to suspension or within a reasonable time thereafter," in the context of the whole opinion, is that in usual circumstances, the hearing must precede suspension, while in an emergency it must be held as soon as practicable.

Notice of what the student is accused of doing and the basis of the accusation must precede the student's opportunity to tell his or her side of the story, or the student will be denied any meaningful opportunity to make an explanation as required by *Goss*. These procedures must be followed even when the disciplinarian has himself or herself witnessed the alleged misconduct.

Citing administrative burdens and the need for discipline as part of the educational process, the Court refused to hold that students facing short suspensions have the right to counsel, presentation of witnesses, or confrontation and cross-examination of adverse witnesses. *Id*. at 583.

Other elements of due process may also be essential to the abbreviated procedures, although the Court did not mention them. For example, the district court held that the required procedures include the right to include statements by others in defense of the student. 372 F.Supp. 1279, 1302 (S.D. Ohio, 1973). The Supreme Court did not explicitly approve, but neither did it disapprove the lower court's decision on this point. In addition, it seems reasonable to require that determinations of misconduct be based on substantial evidence, as a protection against arbitrary action. *Vail v. Board of Education of Portsmouth School District*, 354 F.Supp. 592, 603 (D.N.H. 1973), *remanded for fuller relief on other issues*, 502 F.2d 1159 (1st Cir. 1973), and cited with approval in *Goss*, 419 U.S. 565, n.8 at 577, 582. (See also pp. 247-48, *infra*.) Likewise, *Goss* assumed that the person making the disciplinary decision was impartial and not directly and emotionally involved in the problem. (See this note at pp. 239-41, *infra*.).

SHORT TERM SUSPENSION -- UNUSUAL CIRCUMSTANCES REQUIRING MORE ELABORATE PROCEDURES

Although the Court in *Goss* recognized the possibility of "unusual situations" which would require "something more than the rudimentary procedures" required in *Goss*, it does little to illustrate what these unusual circumstances might be. The only example to which the Court alludes involves "the existence of disputes about facts and arguments about cause and effect." 419 U.S. 565, 583-84 and suggests that in these cases the disciplinarian will want to adopt a more formal procedure, *id*. at 584:

> He may then determine himself to summon the accuser, permit cross-examination and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

Other "unusual situations" which might trigger more formal procedures include 1) repeated individual suspension which accumulate to represent more than 10 days out of school in an academic year; 2) short suspensions involving racial altercations where an abbreviated procedure might be interpreted by one faction as unduly favoring the other; 3) short suspensions which are accompanied by additional, serious punishments (such as academic punishment); 4) short suspensions which take place during an examination period and which do not make provision for a make-up without additional academic penalties; 5) short suspensions initiated by a teacher against whom students have lodged an unresolved complaint relating to that teacher's fairness in dealing with students; 6) a suspension involving a very serious charge against a student, *e.g.*, stealing a wallet.

In all of these situations, the abbreviated procedure authorized in Goss may not provide "a meaningful hedge against erroneous action." Id. at 583. Certainly, in these unusual circumstances, the extra cost and the potentially detrimental impact on teaching effectiveness -- elements the Goss Court took into consideration when deciding that a truncated procedure would be most appropriate in the usual 10-day suspension -- become relatively less significant in comparison. Here the teaching function of the school may well suffer if careful and formal attention is not given to the procedures followed before students are disciplined. The more formal hearing in these cases would permit more careful deliberation and consideration of the long-term effects of the short-term suspension. For the student who must necessarily suffer academic punishment as part of the suspension, the long-term effect of this on the student should be considered. For the situation where there is a dispute over facts and causation, long-standing hostility between students involved, or between student and teacher, a more formal hearing could serve as a forum for resolving the more persistent problems underlying the immediate problem, and in the long-run permit the school to function more smoothly.

Goss does not specify what fuller procedures might be necessary in the unusual short-term suspension. It is possible that they may still fall short of those required by the lower courts for long-term suspensions and expulsions. The court only noted that in these circumstances the disciplinarian "may" decide to permit cross examination, the right to present witnesses and "in more difficult cases," the right to counsel. 419 U.S. at 584. Peter Roos, one of the lawyers representing students in Goss has concluded that

> A genuine factual dispute would probably enlist the following procedures in ascending order: presentation of witnesses and other evidentiary material, confrontation and cross examination and right to counsel. Further, upon a showing of the need for these more formal procedures, the notice requirement should be converted into a written notice and there should be given adequate time to prepare for the "hearing".

Roos, Goss and Wood: Due Process and Student Discipline, 20 INEQUALITY IN EDUC. 42, 44 (Aug. 1975).

THE EMERGENCY SUSPENSION

Goss required a prior hearing in normal circumstances, and a subsequent hearing "as soon as practicable" in the emergency situation. 419 U.S. at 567 n.6, 581-82 & 583. The Court unfortunately defines neither the emergency nor the appropriate duration of the emergency suspension. The summary suspension, even in emergency situations, should be carefully limited, because of the potential damage to the student. If a student is first suspended, and then -- after the suspension period is over -- found to be innocent of the offense which triggered the suspension, what can make up for the time lost? Expungement and an apology cannot restore to the student the loss of precious days in the classroom. Worse, if a student is first suspended and then, after the suspension period is over, found to be innocent, the hearing will be a farce. What point is there in deciding after the sanction has been imposed whether or not it should be imposed? Moreover, the truncated form of the emergency hearing makes it easy to execute. One court, prior to Goss, required only notice of the charges, and a right to make a statement. Buck v. Carter, 308 F.Supp. 1246 (W.D. Wis. 1970). Another indicated that it would require notice of both the charges and the regulations which were allegedly violated, the issue to be decided, and notification of the student's right to a full hearing at a later date. Marin v. University of Puerto Rico, 377 F.Supp. 613, 624, (D.P.R. 1974) (three-judge court). In either event, little time or effort is required.

WHAT CONSTITUTES AN EMERGENCY?

It is obvious that occasions exist when removal from classes, or from the school, may be appropriate to restore order in a school which has been seriously disrupted or to remove a clearly dangerous student. School officials have an obligation to avoid a clear and present danger to the school, students and teachers, and to prevent serious and prolonged disruptions of the educational process.

In one of the fact situations reviewed in Goss, -- the case of Dwight Lopez -- there had been a disturbance in the school lunchroom involving some property damage. The student testified that 75 other students were suspended in the aftermath. Lopez never received a hearing. In another, Betty Crome was present at a demonstration taking place off campus. She and others were arrested by the police and released without formal charges. She received a notice on the following day that she would be suspended for 10 days. Id. at 570. This district court recognized that emergency situations may justify immediate, summary removal of students, Lopez v. Williams, 372 F.Supp. 1279, 1301 (S.D. Ohio 1973), but made no connection between this rule and the facts of the case. The summary treatment was found invalid. The Supreme Court likewise recognized the necessity of permitting emergency suspensions but affirmed the district court's finding that due process had been denied on these facts.

However, the trial court and the Supreme Court consistently indicated that the process lacking was the failure to grant a hearing "prior to suspension or within a reasonable time thereafter." 372 F.Supp. at 1302; 419 U.S. at 567. See also id. n. 6, 581-82. Thus, both courts were acknowledging that there was the question of fact as to whether an emergency existed which would justify a suspension prior to hearing. The Supreme Court specifically observed that

> . . . . [B]oth suspensions were imposed during a time of great difficulty for the school administrations involved. At least in Lopez' case there may have been an immediate need to send home everyone in the lunchroom in order to preserve school order and property; and the administrative burden of providing 75 "hearings" of any kind is considerable. However, neither factor justifies a disciplinary suspension without at any time gathering facts relating to Lopez specifically, confronting him with them, and giving him an opportunity to explain.

419 U.S. at 581 n.9.

Prior federal court decisions dealing with emergency action involved the presence of a firearm on campus, Gardenhire v. Chalmers, 326 F.Supp. 1200, 1205 (D.Kan. 1971); the actual firing of weapons and injury to persons and property, Buck v. Carter, 308 F.Supp. 1246 (W.D. Wis. 1970); the setting of false fire alarms, Betts v. Board of Educ. of Chicago, 466 F.2d 629 (7th Cir. 1972) (disciplinary transfer to a school which did not offer academic credit); and a strong possibility of disorder, Stricklin v. Regents of Univ. of Wisconsin, 297 F.Supp. 416 (W.D. Wis. 1969), appeal dismissed as moot, 420 F.2d 1257 (7th Cir. 1970).

The court in Stricklin had occasion to consider whether an oral report from the security chief of the school to the effect that certain students had participated in a prior disorder and that "there were strong indications that it would be repeated" was sufficient to justify an emergency suspension without a hearing. A full hearing was scheduled within 13 days of the so-called emergency suspension. Judge Doyle held that the emergency was adequate to justify suspension prior to a full hearing, but not prior to a preliminary, abbreviated hearing. Judge Doyle did not undertake to define the minimal requirements of this preliminary hearing, but he clearly distinguished it from the fuller hearing required in long-term suspensions. It seems reasonable to assume that Judge Doyle would now require the rudimentary procedures required in Goss on this same fact situation, to be followed by a second, fuller hearing within a reasonable time.

In a subsequent case, Judge Doyle also set forth standards to follow in determining whether an "emergency" justified a summary suspension. The situation clearly was "emergency," involving use of firearms and injury to persons and property. Buck v. Carter, 308 F.Supp. 1246 (W.D. Wis. 1970).

Following the requirements of Stricklin, school officials called in the students for a prior preliminary hearing. At this preliminary hearing, officials took no action against two students who specifically denied being present at the raid and suspended the remainder pending a full hearing which was to take place in three weeks. (The timing did not require many days of absence from school because of Christmas and New Year's vacations.) The officials found the temporary action warranted because the students' "continued presence on this campus poses a clear and present danger to the university community" and the students themselves.

The students sought relief from Judge Doyle, who found that the officials must take the following steps in deciding to suspend a student for emergency reasons:

1) Make an "initial evaluation of the reliability of the information received . . . " as to both the incident and the individuals involved. Id. at 1248.

2) Determine that the conduct was such as "reasonably to indicate that the prompt separation" of the student is warranted for reasons relating to the safety and well being of persons and property. Id.

3) Allow the student an abbreviated hearing "at the earliest opportunity" which includes the right to appear before a school official, be notified of the charges against him, and to make a statement. Id. at 1248-49. The court also noted that if the student admits guilt, the officials

may end the hearing at that point but if the student offers a plausible denial, they should investigate further.

Judge Doyle found that the necessary steps were taken, with a possible exception that notice was deficient. He denied relief, however, since the students had given cautious and limited responses without specifically denying being present at the raid.

In Betts the court decided that the student was not entitled to a preliminary injunction where there was adequate notice of the charges (given over the telephone), sufficient time to prepare for the hearing (held the following morning) and an orderly hearing. 466 F.2d at 633. The court noted that the student had admitted guilt, and the misconduct was "gross" -- thus limiting the hearing to the question of punishment. Id. The court also pointed out that it was not ruling out the possibility of relief for the student at trial. Id. at 635.

HOW LONG SHOULD AN EMERGENCY SUSPENSION CONTINUE?

Although the Court in Goss did not specifically apply the emergency suspension rule to the facts before it, the court below had taken it into account when shaping its final order, and its observations were noted in the Supreme Court opinion. 372 F.Supp. at 1302; 419 U.S. at 572. The three judge court's conclusions required, 372 F.Supp. at 1302:

1. Immediate removal of a student whose conduct disrupts the academic atmosphere of the school, endangers fellow students, teachers or school officials, or damages property.
2. Immediate written notice to the student and parents of the reason(s) for the removal from school and the proposed suspension should be given within 24 hours.
3. Not later than 72 hours after the actual removal of the student from school, the student and his parents must be given an opportunity to be present at a hearing before a school administrator who will determine if a suspension should be imposed.

Thus, Goss was affirmed on the assumption that an emergency suspension could be imposed, so long as notice was given by the next day, and a hearing within three days.

This holding does not clarify the permissible length of the emergency suspension. It would seem reasonable to make the emergency suspension last only so long as necessary for a "cooling off period." Once the emergency is past, the student should be reinstated in school; a hearing can be held within the time limits prescribed whether the student is in or out of school. The permissible length of the "cooling off period" really should depend on the circumstances. Where a small number of students are engaged in a ruckus, the adults in charge could reasonably expect that the kids would be calm and orderly by the next day, and suspension should last only until the end of the current school day. Students exhibiting more violent propensities might warrant suspension until hearings could be held. In Gardenhire v. Chalmers, for example, the student reportedly carried a firearm to school and had been criminally charged with attempted murder -- clearly a cause for alarm, if true. The judge observed that five to 15 days might be a reasonable period of time for a temporary or interim emergency suspension, but he found the period from December 10 (the date of suspension) to February 1 (the date of the court decision) too long. 326 F.Supp. 1200, 1205 (D. Kan. 1971). The alleged danger was not diminished, but the judge apparently felt that school authorities should have and could have arranged for a hearing before February 1. The court indicated that notice should be simultaneous with the suspension, or a few days after, and "an evidentiary hearing" within five to 15 days. Id.

In any case, the emergency suspension cannot last beyond the date on which the hearing must be held -- and the lower court in Goss set this at three days. If the school cannot hold a hearing within three days, the student should be reinstated until the hearing is held. The seriousness of the presumed guilt of the person to be suspended for emergency reasons should not provide school officials with an excuse for failure to observe due process. Again, this timely hearing could be informal, but if a longer-term suspension or other serious punishment is to follow, it must be followed up by a full hearing at a later date.

LONG-TERM SUSPENSION AND EXPULSION

BACKGROUND

In general, while the Supreme Court in Goss considerably clarified the requirements of procedural due process for normal short-term suspensions, it did very little to specify the requirements for longer term suspensions and expulsions.

The only other Supreme Court case dealing with procedural due process is Wood v. Strickland, 420 U.S. 308 (1975), notable because the Court held that plaintiffs could collect damages under 42 U.S.C. 1983 if they could prove lack of good faith in connection with a violation of their procedural due process rights. Here, the Court had some occasion to consider whether due process had been followed prior to a long-term suspension. The plaintiffs had admitted to "spiking" punch served at a school function. The alcoholic content of the spiked punch was almost insignificant, but the incident became quite important to school officials. The principal summarily suspended the girls for a two-week period, subject to a decision by the school board. The same day the school board met, with the girls absent. and voted to expel the girls for the remainder of the semester (three months). Later, the board agreed to rehear the matter, and did so approximately two weeks after the first meeting. The girls, their parents and counsel attended the second meeting. The girls admitted mixing two bottles of malt liquor into the punch, and the board determined to adhere to its expulsion decision. The court of appeals found that the board made its decision in the absence of evidence that the rule had been violated. The Supreme Court found that there was evidence, and that the appellate court was ill-advised to require the board to find that the alcoholic content of the spiked product had to meet state law definitions of "intoxicating." Notably, the Supreme Court assumed the lack of evidence would be a valid ground for judicial reversal of an administrative disciplinary decision. Id. at 323, 326. The Court left open the question whether a fuller hearing at the second board meeting cured the procedural due process defects apparent at the first. *Id.* at 327.

Since this is the only pronouncement on the nature of the more formal hearing required for more serious disciplinary cases, lower court decisions must be consulted.

It should be noted initially that many judicial scholars will declare that the courts are not and should not spell out procedures -- because any number of acceptable procedures may be available. See, *e.g.*, *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961):

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.

See also *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972); *DeJesus v. Penberthy*, 344 F.Supp. 70, 74 (D.Conn. 1972). It is nonetheless useful to identify certain basic elements of procedural due process which must be present before serious disciplinary action can be taken.

Courts disagree on what these procedures should be. The only agreement seems to be that the full panoply of procedures associated with criminal judicial processes are not required. *E.g.* *Ingraham v. Wright*, 498 F.2d 248, 267, *rehearing en banc ordered*, 504 F.2d 1379 (5th Cir. 1974) (corporal punishment); *Farrell v. Joel*, 437 F.2d 160, 162 (2d Cir. 1972); *Jones v. State Bd. of Educ.*, 279 F.Supp. 190, 205 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed*, 397 U.S. 31 (1970); *Esteban v. Central Mo. State Col.*, 277 F.Supp. 649, 651 (W.D.Mo. 1967), *approved in* 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

A leading case is *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). The Supreme Court has cited this case with approval several times. See, *e.g.*, *Goss v. Lopez*, 419 U.S. at 576 n.8 (1975) (referring to it as a "landmark decision"); *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970); *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 506 n.2 (1969).

In *Dixon*, college officials summarily expelled plaintiffs, who were Black, after they had participated in lunch counter sit-ins and mass demonstrations in connection with the civil rights movement. The court held that due process would require that the officials first give the students a notice containing a statement of the charges against them, that prior to a hearing, students receive the names of witnesses and a report of the facts to which each would testify, and at a hearing each student be allowed to present a defense and produce evidence in his own behalf. *Id.* at 158-59.

The court in *Dixon* also faced a contention by college officials that plaintiff students had waived their right to notice and a hearing upon attendance at the college, under authority of a rule which authorized the college to "decline to continue to accept responsibility for the supervision and service to any student with whom the relationship becomes unpleasant and difficult." The court held that "it nonetheless remains true that the state cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process. 294 F.2d 150,156.

In *Dixon*, the court also provided some detail on the requirements for notice and hearing. The notice must contain "specific charges," and the hearing could vary depending on circumstances. In any case, it had to be more than "an informal interview." The right to cross-examine witnesses was not required, but the right to receive names of adverse witnesses and a report of their testimony was. It was also considered rudimentary that the student should have an opportunity to present a defense, including the calling of witnesses or the presentation of affidavits. *Id*. at 156-57. The general principle of *Dixon* -- that procedural due process must precede a decision to expel a student from a state-supported school or university -- has been universally accepted. In addition to subsequent Supreme Court references to *Dixon* in other cases, courts have followed it in *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Jones v. State Bd. of Educ.*, 279 F.Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 334 (6th Cir. 1969), *cert*. *dismissed*, 397 U.S. 31 (1970); *Esteban v. Central Missouri State Col.*, 277 F.Supp. 649 (W.D. Mo. 1967), *approved*, 415 F.2d 1077 (8th Cir. 1969), *cert*. *denied*, 398 U.S. 965 (1970), and many other cases.

Esteban is among the more important of these cases because it was reviewed by an appellate court judge who subsequently became a Supreme Court Justice. In *Esteban* a district court held that students suspended for two semesters were entitled to a more adequate hearing. They had been permitted to present their side of the story to only one of several persons who decided on the sanction. In so doing, the district court specified that the new hearing must include, *id*. at 651-52:

> (1) a written statement of the charges to be furnished each plaintiff at least 10 days prior to the date of the hearing; (2) the hearing shall be conducted before the President of the college; (3) plaintiffs shall be permitted to inspect in advance of such hearing any affidavits or exhibits which the college intends to submit at the hearing; (4) plaintiffs shall be permitted to have counsel present with them at the hearing to advise them; (5) plaintiffs shall be afforded the right to present their version as to the charges and to make such showing by way of affidavits, exhibits, and witnesses as they desire; (6) plaintiffs shall be permitted to hear the evidence presented against them, and plaintiffs (not their attorney) may question at the hearing any witness who gives evidence against them; (7) the President shall determine the facts of each case solely on the evidence presented at the hearing therein and shall state in writing his finding as to whether or not the student charged is guilty of the conduct charged and the disposition to be made, if any, by way of disciplinary action; (8) either side may, at its own expense, make a record of the events of the hearing.

The new hearing was held, and this time, the district court upheld the suspensions, and the eighth circuit (Judge Blackmun) affirmed. 290 F.Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert*. *denied*, 398 U.S. 965 (1970). Blackmun also expressly approved the first decision of the district court, observing that procedural due process must be afforded "by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures." 415 F.2d at 1089. See also *id*. at 1081.

ELEMENTS OF DUE PROCESS FOR SERIOUS SANCTIONS

Although courts have generally followed *Dixon* and *Esteban*, there have been fact situations where deviations seem warranted, and, more important, other problems have arisen which were not contemplated in these cases, and which would necessitate additional safeguards to the student. Thus, it is useful to review each element of a full hearing separately and discuss the precedent for or against that particular requirement. A *caveat* is in order, however; the absence of one element of due process does not necessarily invalidate an otherwise fair hearing. See pp.251-53, *infra*.

Prior Hearing

Goss, which requires a hearing prior to a short-term suspension, obviously serves as good authority for a hearing prior to a long-term suspension, except for emergency situations. See this note at pp. 218-31, *supra*. Prior to *Goss* federal courts had generally accepted the principle that the hearing should precede the imposition of a serious sanction. See, *e.g. Black Students v. Williams*, 470 F.2d 957 (5th Cir. 1972), *aff'ing*, 335 F.Supp. 820 (M.D.Fla.); *Pervis v. La Marque Ind. Sch. Dist.*, 466 F.2d 1054, 1058 (5th Cir. 1972); *Dunn v. Tyler Indep. Sch. Dist.*, 460 F.2d 137, 144 (5th Cir. 1972); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir.), *cert.denied*, 400 U.S. 850 (1970); *Graham v. Knutzen*, 351 F.Supp. 642 (D.Neb. 1972); *Fielder v. Board of Educ. of Winnebago in Thurston County Nebraska*, 346 F.Supp. 722 (D.Neb. 1972); *Graham v. Houston Independent Sch. Dist.*, 355 F.Supp. 1164 (S.D. Tex. 1970); *Esteban v. Central Missouri State Col.*, 277 F.Supp. 649, 651; *Kelley v. Metropolitan County Bd. of Educ.*, 293 F.Supp. 485, 493 and 494 (M.D. Tenn. 1968).

It would appear that *Goss* effectively overrules contrary cases such as *Greene v. Moore*, 373 F.Supp. 1194 (N.D. Tex. 1974) and *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 700 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). *Boykins* could possibly be considered an emergency suspension case (the situation forced closure of the school for part of a day), and may be considered consistent with *Goss*, except for the extended time period permitted for the emergency suspension (15 days).

Burden on University to Initiate Hearing

One university suspended a student and argued that due process was met because it allowed the student a "right of review." The court rejected this contention, pointing out that,

> . . . the "right of review" (of a hearing only upon request), does not serve to protect the right of the student to fundamental fairness in this type of proceeding. One does not have to be a supplicant for allowance of a constitutional right.

Gardenhire v. Chalmers, 326 F.Supp. 1200, 1204 (D.Kan. 1971). *Accord*, *Knight v. State Bd. of Educ.*, 200 F.Supp. 174, 181 (M.D. Tenn. 1961). But see *Grayson v. Malone*, 311 F.Supp. 987 (D. Mass. 1970) (pupil waived right to hearing by not requesting reinstatement).

Reinstatement Pending Hearing

A logical corollary to a prior hearing requirement is a right of students to obtain a court order reinstating them when this requirement was not met. This was the holding in Woods v. Wright, 334 F.2d 369 (5th Cir. 1964). Plaintiff was summarily expelled following participation in a demonstration against segregation (a "parade without a permit"). The district court denied a request for a temporary restraining order. The appeals court reversed and remanded, finding a "clear and imminent threat of an irreparable injury amounting to manifest oppression . . . ." Id. at 375. The court also refused to vacate a stay order it had granted pending appeal. Conceding that the students no longer needed this protection (reinstating them in school) because the school term had ended, the court nonetheless ruled the order was required to forbid the enforcement of the Board of Education's mandate to expel any student parading without a permit. See also Gardenhire v. Chalmers, 326 F.Supp. at 1206 (reinstatement, but court stayed order one month to allow university option of holding due process hearing before reinstatement).

Only one case has been located where a court refused to reinstate a student pending a full board hearing. DeJesus v. Penberthy, 344 F.Supp. 70, 78 (D. Conn. 1972), accord, Jones v. Snead, 431 F.2d 1115, 1117 (8th Cir. 1970) (dictum). In as much as the delay will carry the suspension beyond the permissible waiting period, DeJesus is clearly in conflict with Goss. However, if the student is permitted to remain in school while awaiting the second hearing, there is probably no prejudice to his case.

Subsequent Adequate Proceedings As Cure to Earlier Inadequate Proceedings

Another point which has not been discussed very much, but which clearly can prejudice a student's right to a prior hearing, involves the question of whether or not procedural defects in an initial suspension hearing can be cured by a procedurally correct second hearing. The point has appeared twice before the Supreme Court, but it did not decide it in either case. In Wood v. Strickland, 420 U.S. 308, 327 (1975), the Court simply directed the court below to decide the issue. In Goss v. Lopez, 419 U.S. 565 at n. 10, the court considered an argument by school officials that subsequent judicial review could cure a procedural defect at the school hearing. The court did not decide the point, but found on the facts before it that the available judicial review was inadequate to cure such defects, even assuming that it could be cured in this way. The Court rejected the "cure" because the statute did not require that the judicial hearing be de novo, and would involve additional delay while the student remained deprived of his right to attend school.

In Pervis v. LaMarque Ind. Sch. Dist., 466 F.2d 1054, 1058 (5th Cir. 1972) the court found the "cure" inadequate:

> The dangers inherent . . . are obvious. Suppose at the subsequent hearing that appellants had been vindicated. How, then, could they then have been made whole? They would have lost some 3 months of education. This result cannot obtain.

However, numerous decisions have deemed certain procedural defects in initial hearings to be "cured" by a subsequent adequate *de novo* hearing. *E.g.*, *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972); *Sullivan v. Houston Ind. Sch. Dist.*, 475 F.2d 1071, 1077 (5th Cir. 1973) (a biased hearing officer presided over the first hearing); *Williams v. Vermillion Parish Sch. Bd.*, 345 F.Supp. 57 (W.D. La. 1972); *Barker v. Hardway*, 283 F.Supp. 228 (S.D.W.Va.) *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); *Bistrick v. University of South Carolina*, 324 F.Supp. 942 (D.S.C. 1971); *Zanders v. Louisiana State Bd. of Educ.*, 281 F.Supp. 747 (W.D.La. 1968); *Ector County Ind. Sch. Dist. v. Hopkins*, 518 S.W. 2d 576 (Tex. App. Ct. 1974).

Written Notice

Goss required oral or written notice for short suspensions. Lower courts have generally held that for long-term suspensions or expulsions the notice should be in writing. *Pervis v. LaMarque Indep. Sch. Dist.*, 466 F.2d 1054 (5th Cir. 1972); *Dunn v. Tyler Indep Sch. Dist.*, 460 F.2d 137, 144 (5th Cir. 1972); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *Dixon*, 294 F.2d 150, 158; *Vail v. Board of Education of Portsmouth*, 354 F.Supp. 592, 603 (D.N.H.), *remanded for additional relief*, 502 F.2d 1159 (1st Cir. 1973) (and cited with approval in *Goss*, 419 U.S. 565 at n.8); *Quintanilla v. Carey*, Civil No. 75-C-829 (N.D. Ill. Mar. 31, 1975) (Clearinghouse Review No. 15,369A); *Mills v. Board of Educ.*, 348 F.Supp. 866, 882 (D.D.C. 1972); *Fielder v. Board of Educ.*, 346 F.Supp. 722, 730 (D. Neb. 1972); *Givens v. Poe*, 346 F.Supp. 202, 209 (W.D.N.C. 1972); *DeJesus v. Penberthy*, 344 F.Supp. 70 (D. Conn. 1972); *Pierce v. School Comm. of New Bedford*, 322 F.Supp. 957 (D. Mass. 1971); *Davis v. Ann Arbor Public Schools*, 313 F.Supp. 1217 (E.D. Mich.1970); *Lafferty v. Carter*, 310 F.Supp. 465 (W.D. Wis. 1970); *Sullivan v. Houston Ind. Sch. Dist.*, 307 F. Supp. 1328, 1346 (S.D. Tex. 1969), *informally approved*, 475 F.2d 1071 (5th Cir. 1973) (rev'g supplementary order); *Stricklin v. Regents*, 297 F. Supp. 416 (W.D. Wis. 1969) *appeal dismissed as moot*, 420 F.2d 1257 (7th Cir. 1970); *Vought v. Van Buren Public Sch.*, 306 F.Supp. 1388 (E.D. Mich. 196); *Marzette v. McPhee*, 294 F.Supp. 562 (W.D. Wis. 1968); *Kelley v. Metropolitan Co. Bd. of Educ.*, 293 F.Supp. 485 (M.D. Tenn. 1968); *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education*, 45 F.R.D. 133 (1968); *Esteban v. Central Mo. State Col.*, 277 F.Supp. 649, 651 (W.D. Mo. 1967), *approved* 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *Knight v. State Board of Educ.*, 200 F.Supp. 174 (M.D. Tenn. 1961); *Cf.*, *Schiff v. Hannah*, 282 F. Supp. 381, 383 (W.D. Mich. 1966) (requiring a letter). See also *Caldwell v. Cannady*, Civil No. CA-5-994 (N.D. Tex. Jan. 25, 1972) (order)(Clearinghouse Review No. 7424 A); *Anonymous v. Winooski Sch. Dist.*, Civil No. 74-86 (D.Vt. Apr. 10, 1974) (preliminary injunction).

In keeping with the general principle that a single procedural defect will not necessarily taint an otherwise fair hearing, courts have essentially found no prejudice to the student's right to notice where it could be demonstrated that the student (and parents, where appropriate) had full knowledge of the charges). See, e.g., Davis v. Ann Arbor Public Schools, 313 F.Supp. 1217, 1226-27 (E.D. Mich. 1970). Of course, if students cannot be located because they failed to keep the school informed of their address, the notice requirement will be excused. Wright v. Texas So. Univ., 392 F.2d 728 (5th Cir. 1968).

Notice Reasonably in Advance of Hearing

Due process should also require that school officials give the student ample time to review the charges and prepare the student's presentation. See generally, Fielder v. Board of Educ., 346 F.Supp. at 730; Bistrick v. Univ. of South Carolina, 324 F.Supp. 942, 950 (D.S.C. 1971); Sullivan v. Houston Ind. Sch. Dist., 307 F.Supp. at 1343; Knight v. State Bd. of Educ., 200 F.Supp. at 178. The number of days notice should precede the hearing probably will depend on the complexity of the facts and other circumstances to be reviewed at the hearing. Thus, the requisite number of days from notice to hearing have varied. See Fielder v. Board of Educ., 346 F.Supp. at 724 n.1 (three days minimum); Jones v. State Board of Educ., 279 F.Supp. 190, 199 (M.D. Tenn. 1968) (two days sufficient) aff'd, 407 F.2d 834 (6th Cir. 1969), cert. dismissed, 397 U.S. 31 (1970). Esteban v. Central Mo. State Col., 277 F. Supp. at 651 (W.D. Mo. 1967) (10 days required); Marzette v. McPhee, 294 F.Supp. at 567 (W.D. Wis. 1968) (10 days required); Schiff v. Hannah, 282 F. Supp. 381, 383 (W.D. Mich. 1966) (estimated 20 days or more). (Schiff v. Hannah required the extra time because there the court also required that students first be given 10 days after notice to prepare a reply, and that the hearing would be held 10 days after receipt of this reply.) The Court in Mills v. Board of Educ. of District of Col. required a hearing to be held within four days of giving notice, but granted parents "no more than five . . . additional school days" where necessary for preparation for the hearing. 348 F.Supp. 866, 882 (D.D.C. 1972).

Finally, one court has observed that written notice two days prior to the hearing may be inadequate but where other aspects are fair, the court will not invalidate the disciplinary proceedings. Center for Participant Educ. v. Marshall, 337 F.Supp. 126, 136 (N.D. Fla. 1972). One court noted more than two days notice "might be desirable" but found proceedings adequate where plaintiff failed to request an extension. Whitfield v. Simpson, 312 F.Supp. 889, 895 (E.D.Ill. 1970).

One case stands alone in permitting notice to be given at the hearing itself. Due v. Florida Agr. and Mech. Univ., 233 F.Supp. 396 (N.D. Fla. 1963) (Judge Carswell). It is clearly a minority review.

One case also made it clear that for high school students, the notice must be given to both student and parent or guardian. In Sullivan v. Houston Ind. Sch. Dist., 307 F.Supp. at 1343, 1346 the court said:

> Parents or guardians have legal obligations to children of high school age and common sense dictates that they should be included in any disciplinary action against their children which could result in severe punishment. Indeed it may be even more crucial that proper written notice of charges be provided to parents for often they do not know

what has transpired at school.

Specificity of Charges

In order to constitute an adequate notice, the charges must, of course, be explained specifically enough that the student knows what kind of response to make. Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir.), cert. denied, 368 U.S. 930 (1961); Anonymous v. Winooski Sch. Dist., Civil No. 74-86 (D.Vt. April 10, 1974); Keller v. Fochs, 385 F.Supp. 262 (E.D.Wis. 1974); Bistrick v. Univ. of South Carolina, 324 F.Supp. 950; Mills v. Board, 348 F.Supp. 866, 880; Givens v. Poe, 346 F.Supp. 202, 209 (W.D.N.C. 1972); Scoggin v. Lincoln Univ., 291 F.Supp. 161, 171 (W.D.Mo. 1968); Schiff v. Hannah, 282 F.Supp. 381, 383 (W.D.Mich. 1966); General Order on Judicial Standards of Procedure . . . , 45 F.R.D. 133 (1968); Woody v. Burns, 188 So.2d 56, 58 (Dist.Ct. App. Fla. 1966). For an example of lack of specificity, see Scott v. Alabama State Bd. of Educ., 300 F.Supp. 163 (M.D.Ala. 1969) (upholding sanctions because another of the charges was found sufficiently specific). The court found the following to be a defective charge, id. at 166:

> willful refusal to obey a regulation or order of Alabama State, such refusal being of a serious nature and contributed to a substantial disruption of the administration and operation of the college.

One court also required that the notice refer to the "specific, previously promulgated regulations under which the charges are brought . . . ." Marin v. University of Puerto Rico, 377 F.Supp. 613, 623 (D.P.R. 1974).

Advance Notice of Evidence

In addition to notice of the charges, students facing serious disciplinary sanctions have been allowed to receive advance information on the witnesses and the evidence which will be reviewed at the hearing. In once case, the court required that the notice of charges also contain the names of witnesses to be used at the hearing and a statement on the nature of testimony of each witness. Caldwell v. Cannady, Civil No. CA-5-994, (N.D. Tex. Jan.25 , 1972) (order) (Clearinghouse Review No. 7424A) (final judgment at 340 F.Supp. 835 (1972).

A number of other courts have also made general rulings requiring advance notice of the evidence. E.g., Quintanilla v. Carey, Civil No. 75-C-829 (N.D.Ill., Mar. 31, 1975) (Clearinghouse Review No. 15,369A); Marin v. University of Puerto Rico, 377 F.Supp. at 623. Graham v. Knutzen, 362 F.Supp. 881 (D.Neb. 1973); General Order on Judicial Standards of Procedure . . . , 45 F.R.D. 133, 147 (W.D. Mo. 1968); Sullivan v. Houston Ind. Sch. Dist., 307 F.Supp. at 1346. This includes inspection of affidavits or exhibits prior to the hearing. Esteban v. Central Mo. State Col., 277 F.Supp. at 651; Marzette v. McPhee, 294 F.Supp. 562, 567. It may also include a witness list and a summary of each witness' story. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961); Marzette v. McPhee, 294 F.Supp. 567; Bistrick v. Univ. of South Carolina, 324 F.Supp. 942, 950. Anonymous v. Winooski Sch. Dist., Civil No. 74-86 (D.Vt., Apr. 10, 1974) required inspection of any written reports five days prior to the hearing.

On the other hand, in Wasson v. Trowbridge, the Merchant Marine Academy case, the seond circuit held that the cadet was "not entitled to see the confidential opinions of members of the faculty." This was made subject to the important safeguard that he should not be dismissed "without the holding of an evidentiary hearing into the nature of the concealed evidence, if any, and the reason for withholding it." 382 F.2d 807, 813 (2d Cir. 1967).

Proceeding Confined to Charges Contained in the Notice

It would seem logical to conclude that if a student received notice of one charge, but was punished for another, the notice of the actual charges was inadequate. In one case a plaintiff attended an expulsion hearing where the issue focused on plaintiff's assault on another student. After he left, the school board discussed the possible violation of a school rule against "incorrigibly bad conduct" and expelled him without specifying the basis. The expulsion was voided as the plaintiff had no notice of the possible alternative ground for expulsion. DeJesus v. Penberthy, 344 F.Supp. 70 (D.Conn. 1972). In another case, arising out of mass demonstrations at Grambling College, students initially received a favorable court order temporarily staying their suspensions pending a full hearing. They were then given a full, week-long adversary hearing, and were suspended. On a second appeal, the district court refused preliminary relief and the court of appeals affirmed. Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975). The main challenge to the hearings centered around the hearing board's finding that there was a conspiracy among the students, and that evidence against students who did not appeal could be considered in the cases of those that did. The court agreed with the students that due process required that they receive notice of the conspiracy charge, and that it was not specifically mentioned in the notice that they received. However, the court nonetheless found notice adequate, id. at 1000-1001:

> College administrators should not be held to the strict requirements of criminal law relating to giving notice of conspiracy. Although here the notice given to appellants could undoubtedly have been drafted with more precision, the charges do include numerous allegations of group or concerted actions. The document entitled "Information of Disciplinary Hearing Board" clearly sets forth the type of conduct included in the Board's finding of conspiracy. Appellants were referred to as "organizers," leaders," and instigators." The November 7 letter advised the students that they were charged with the violation of "inciting to riot." Again it is important to note the distinction between a college disciplinary proceeding and a criminal trial. The judicial gloss given to the word "conspiracy" in the field of criminal law should not carry into another area where laymen operate in an altogether different context. The charges, the hearing, and the findings all evidence the fact that the "conspiracy" here involved was the group activity, and the individual participation in that group action. There is no doubt in our minds that the notice given to appellants was in sufficient detail to fairly enable them to present a defense at the Disciplinary Board hearing.
>
> A reading of the record clearly reveals that appellants understood the nature of the charges against them. Their counsel was quite prepared to refute those charges at the hearing and conducted ardent cross-examination of the college's witnesses. Assuming the written charges were deficient, the appellants had more than two weeks between their November 15-16 hearing and the later hearing ordered by the district court in which to prepare a defense to the charge of conspiracy.

Impartial Decision-Maker

A decision on discipline of students by an impartial decision-maker is another obvious requirement of fairness. In a case involving a teacher dismissal, the Supreme Court observed:

> In the present case the trier of fact was the same body that was both the victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal. . . . Appellant requests us to reverse the state courts' decisions upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this Court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the board's multiple functioning vis-a-vis appellant.

Pickering v. Board of Educ., 391 U.S. 563, 578 n.2 (1968) (justifying an independent review of the record).

In Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1003 (5th Cir. 1975) the court held that "there is no question but that a student charged with misconduct has a right to an impartial tribunal." On the facts before it the court held that the particular hearing body was sufficiently impartial, although its members were employees of the college and may have participated in initial investigations of the misconduct at issue in the hearing:

> We are asked to infer that because the Board had already had one hearing and because its members were appointed by the college presidents (who had also employed many of them), the members must have been partial to the college's position. We have not been shown any evidence of bias or prejudice of the Board members, and our own examination of the record has not uncovered any. "Alleged prejudice of university hearing bodies must be based on more than mere speculation and tenuous inferences." Duke v. North Texas State University, supra, 469 F.2d at 834. We do not believe that, under the facts of this case, these students were denied a fair and impartial hearing.

Jenkins is typical of numerous student disciplinary cases. Other courts which have recognized a requirement of impartiality but have found it met on the facts of the case before it include, e.g., Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975) (adequate proceeding before a board not tainted because a cadet honor committee had previously held inadequate proceeding and pronounced student "guilty"); Winnick v. Manning, 460 F.2d 545, 548-49 (2d Cir. 1972) (hearing by men's dean; no proof of "overt bias or prior involvement"); Murray v. West Baton Rouge Parish Sch. Bd., 472 F.2d 438, 443 (5th Cir. 1973) (upholding statute making superintendent the hearing officer); Sill v. Penn. State Univ., 462 F.2d 463, 469-70 (3rd Cir. 1972) (a specially-appointed panel utilized rather than regular board); Lance v. Thompson, 432 F.2d 767 (5th Cir. 1970) (principal who investigated facts and held bearing styled as "disinterested"); Herman v. University of South Carolina, 341 F.Supp. 226, 232-34 (D.S.C. 1971), aff'd, 457 F.2d 902 (4th Cir. 1972) (same) (appeal held by board of trustees some of whom were on hearing panel); Haynes v. Dallas County Jr. Col. Dist., 386 F.Supp. 208 (N.D.Tex. 1974) (hearing by dean who had requested students staging demonstration to desist and assisted in dispersing the gathering); Hawkins v. Coleman, 376 F.Supp.

1330, 1332 (N.D. Tex. 1974) (approving rules authorizing principal or associate superintendent to hear cases but requiring another person to hear it if former were involved); Center for Participant Educ. v. Marshall, 337 F.Supp. 126, 135 (N.D. Fla. 1972) (president presiding over violation of president's executive order); Scott v. Alabama State Bd. of Educ., 300 F.Supp. 163, 167 (M.D. Ala. 1969); Duke v. North Texas State Univ., 469 F.2d 829, 834 (5th Cir. 1972), cert. denied, 412 U.S. 932 (1973) (teaching assistant dismissed, hearing before president's cabinet approved). In another case ruling against the student, the court apparently acknowledged the breach of the rule requiring impartiality, but decided that this one fault would not require invalidation of the proceedings. Members of the faculty group adjudicating the case also testified against the students. Jones v. State Bd. of Educ., 279 F.Supp. 190 (M.D. Tenn. 1968), aff'd, 407 F.2d 834 (6th Cir. 1969), cert. dismissed as improvidently granted, 397 U.S. 31 (1970) (Douglas and Brennan dissenting.) See also Zanders v. Louisiana State Bd. of Educ., 281 F.Supp. 747,768 (W.D. La. 1968) where the court found no evidence of actual bias and upheld a board decision arising out of a hearing where the board's legal advisor acted as prosecutor.

Other courts have both acknowledged the need for impartiality and found it lacking. Generally there was some fact situation which suggested that bias or hostility could be a problem. For example, in Caldwell v. Cannady, 340 F.Supp. 835, 839 (N.D. Tex. 1972) the court required that the state commissioner of education hold an original hearing, after finding substantial "adversary" involvement of the local school board members who had discussed the students' conduct (possessing marijuana) with local prosecuting officials, investigators and grand jury members. In Quintanilla v. Carey, Civil No. 75-C-829 (N.D.Ill. Mar. 31, 1975) (Clearinghouse Review No. 15,369A) the court ordered a school board to appoint an impartial hearing officer and specified that no administrator at the student's high school qualified. Similarly, in Sullivan v. Houston Ind. Sch. Dist., 475 F.2d 1071, 1077 (5th Cir. 1973), the circuit court first observed that an initial hearing before a principal was defective because of the "personal confrontation between principal and student." In this case, it found the defect cured by two extensive de novo appellate hearings, however.

This issue also came up in Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967). The court held that a cadet had a right to challenge the composition of a panel which decided to expel him, to show possible bias. An academy regulation required that members of the panel be free of prior connections with the case. See also Board of Educ. v. Scott, Civil No. 176-814 (Cir. Ct. Mich., Jan. 12, 1972) (Clearinghouse Review No. 7380 C). In Anonymous v. Winooski Sch. Dist., Civil No. 74-86 (D. Vt., Apr. 10, 1974) the court disqualified the school district's principal and superintendent as decision makers and directed the board to perform the task. Both of the disqualified persons had taken steps to remove the student from school for the remainder of the year because of alleged involvement by the student in a "drug scene." On the question of impartiality of the decision maker, the court said:

> While ordinarily the school principal or superintendent of schools is a satisfactory decision-maker in a student suspension or expulsion case, on the particular and somewhat unique facts of this case . . . the official directly involved in gathering facts and making recommendations cannot always have complete objectivity in evaluating them. Thus wihout inpugning the motives or good faith of the principal and superintendent involved in this case, we believe the proper course on the facts before us here is to relieve these officials from any decision-making role in view of their prior direct involvement with plaintiff's case and the strong likelihood that they may be witnesses at the hearing.

For other cases supporting impartiality as a general requirement, see *Marin v. University of Puerto Rico*, 377 F.Supp. 613, 623 (D.P.R. 1974); *Givens v. Poe*, 346 F.Supp. 202, 209 (W.D.N.C. 1972); *Mills v. Board of Educ.*, 348 F.Supp. 866, 883 (D.D.C. 1972) (ordering that hearing officer by D.C. employee but not school employee); *Dixon v. Alabama Board of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *Student Ass'n of the State Univ. of New York v. Toll*, 332 F.Supp. 455 (E.D. N.Y. 1971); *Esteban v. Central Mo. State College*, 277 F.Supp. 649, 651; *Keene v. Rodgers*, 316 F.Supp. 217, 221 (D. Me. 1970).

Right to Counsel

As noted above, *Goss* acknowledged that in "difficult cases" the disciplinarian may decide to permit counsel even for short-term suspensions. On the other hand, the early case of *Dixon* did not mention the role of counsel for long-term suspensions. 294 F.2d 150, 159. Since *Dixon*, courts have disagreed upon whether school officials might allow counsel to be present and active at the hearing. *Esteban* -- notable because it was later reviewed by then judge and now Justice Blackmun -- observed that, 277 F.Supp. 649, 651-52:

> . . . plaintiffs shall be permitted to have counsel present with them at the hearing to advise them . . . and plaintiffs (not their attorney) may question at the hearing any witness who gives evidence against them . . . .

In addition, the Supreme Court in *In re Gault*, 387 U.S. 1 (1967) ruled that a youth appearing in juvenile court has a right to counsel, regardless of the non-criminal nature of the proceedings. Legal scholars generally believe that *Gault* should be extended to school disciplinary proceedings where serious sanctions may be imposed. *E.g.*, Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 110 U. PENN. L. REV. 545, 604-05 (1971); Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1075 (1969); Lines, *Codes for High School Students*, 8 INEQUALITY IN EDUC. 24, 30 (1971).

Nonetheless, some courts have flatly refused to order counsel without any explanation of mitigating circumstances. *E.g.*, *Haynes v. Dallas County Jr. Col. Dist.*, 386 F.Supp. 208, 211-12 (N.D. Tex. 1974); *Due v. Florida Agric. & Mech. Univ.*, 233 F.Supp. 396, 403 (N.D. Fla. 1963); *Barker v. Hardway*, 283 F.Supp. 228, 238 (S.D.W.Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 905 (1969) (no right to counsel in a hearing before an "advisory" and "investigation" body). Courts which have specifically refused to have counsel present and participating in procedures have generally observed that there were circumstances in the facts of the case which reduced the significance of counsel. Thus, in *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967) the court did not interfere with the dismissal of a cadet from a marine academy. The court specifically observed that the academy officials did not use counsel at the hearing, that the student was capable; and that the over-all tenor of the hearing appeared fair and appropriate. *Id.* at 812. Another court refused to order a hearing with counsel present because it characterized the proceeding as non-punitive -- a "guidance conference." *Madera v. Board of Educ.*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). The court specifically noted that it was not deciding on due process required prior to an expulsion. *Id.* at 788.

The developing majority view appears to favor a requirement that counsel be present and participate in the proceedings. See, *e.g.*, *Black Coalition v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973); *Quintanilla v. Carey*, Civil No. 75-C-829 (N.D.Ill., Mar. 31, 1975) (Clearinghouse Review No. 15, 369A); *Anonymous v. Winooski Sch. Dist.*, Civil No. 74-86 (D.Vt., Apr. 10, 1974); *Marin v. University of Puerto Rico*, 377 F.Supp. 613, 623 (D.P.R. 1974); *Mills v. Board of Educ.*, 348 F.Supp. 866, 881, 882-83 (D.D.C. 1972); *Givens v. Poe*, 346 F.Supp. 202, 209 (W.D.N.C. 1972); *Fielder v. Board of Educ. of Winnebago*, 346 F.Supp. 722 n.1 at 724, 730-31 (D.Neb. 1972); *Zanders v. Louisiana State Bd. of Educ.*, 281 F.Supp. 747, 752 (W.D. La. 1968); *Marzette v. McPhee*, 294 F.Supp. 562, 567 (W.D Wis. 1968); *Keene v. Rodgers*, 316 F.Supp. 217, 221 (D.Me. 1970); *French v. Bashful*, 303 F.Supp. 1333, 1337 (E.D. La. 1969), *modified and aff'd per curiam*, 425 F.2d 182 (5th Cir. 1970) (ruling that counsel for student is necessary where board uses counsel); *Barker v. Hardway*, 283 F.Supp. 228 (S.D.W.Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); *Goldwyn v. Allen*, 54 Misc.2d 94, 281 N.Y.S.2d 899, 905 (Sup. Ct. 1967) (sanction was deprivation of right to take a qualifying examination leading to state diploma and admission to several colleges and universities); *Cosme v. Board of Educ. of New York*, 270 N.Y.S.2d 231 (1966); *R.R. v. Board of Educ. of Shore Regional High Sch. Dist.*, 263 A.2d 180, 187 (N.J. Super. Ct. 1970).

In *Graham v. Knutzen*, 362 F.Supp. 881, 884 (D.Neb. 1973) the court refused to expand on a school rule permitting counsel to also permit students to elect non-lawyers as their representatives. The court noted that counsel's presense assured greater regularity in the proceeding.

Presentation of a Defense

Perhaps the most elemental rule of procedural due process relates to the students' right to present a defense. *Goss* includes this right, in abbreviated form, for the short-term suspension. Courts dealing with longer-term suspensions have also uniformly held that the student has this right. *E.g.*, *Ingraham v. Wright*, 498 F.2d 248, 268 (5th Cir. 1974), *rehearing en banc granted*, 504 F.2d 1379 (1974) (witnesses) (corporal punishment case); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2nd Cir. 1967) (witnesses and other evidence); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (witnesses and affidavits); *Quintanilla v. Carey*, Civil No. 75-C-829 (N.D.Ill., Mar. 31, 1975) (Clearinghouse Review No. 15,369A) (witnesses); *Mills v. Board of Educ.*, 348 F.Supp. 866, 882 (D.D.C. 1972) (witnesses); *Givens v. Poe*, 346 F.Supp. 202, 209 (W.D.N.C. 1972); *DeJesus v. Penberthy*, 344 F.Supp. 70 (D.Conn. 1972); *Sullivan v. Houston Ind. Sch. Dist.*, 307 F.Supp. 1328, 1346; *Esteban v. Central Mo. State College*, 277 F.Supp. 649, 651.

In addition, *Wasson v. Trowbridge*, 382 F.2d at 812, specified that they should be given adequate *time* to present this defense. *Esteban* made the obvious clear by noting that this defense is to be presented "to the person or group of persons who have the authorized responsibility of determining the facts of the case and the nature of action, if any, to be taken." 277 F.Supp. at 651.

Cross Examination

As noted above, the Court in Goss did not require cross examination for the usual short term suspension, but thought it might be advisable in "unusual circumstances." The fifth circuit in the leading case of Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159, specifically declined to make it a requirement. See also Winnick v. Manning, 460 F.2d 545, 549-50 (2nd Cir. 1972); Behagan v. Intercollegiate Conf. of Faculty Reps., 346 F.Supp. 602, 608 (D.Minn. 1972); Davis v. Ann Arbor Pub. Schools, 313 F.Supp. 1217, 1227 (E.D.Mich. 1970); General Order on Judicial Standards of Procedure . . . , 45 F.R.D. 133, 146-47 (W.D.Mo. 1968). On the other hand, the Supreme Court did require it in a case involving only a temporary suspension of welfare payments noting that this was required "[i]n almost every setting where important decisions turn on questions of fact . . . ." Goldberg v. Kelly, 397 U.S. 254, 270 (1970). It is reasonable to read Goldberg as applicable to students facing serious disciplinary charges, at least where facts are in dispute. Thus, the early pronouncement in Dixon (decided prior to Goldberg) has been modified numerous times.

For example, in Boykins v. Fairfield Bd. of Educ., 492 F.2d 697 (5th Cir. 1974), cert. denied, 420 U.S. 962 (1975), students were expelled on hearsay evidence -- largely a statement by the school principal relating the results of his investigation which included some first-hand observations and much hearsay. Citing the need for flexibility in the requirements of due process, the court upheld this evidence, id. at 701:

> We decline to place upon a board of laymen the duty of observing and applying the common-law rules of evidence.

The court noted, however, that the students were given a right to cross-examine those witnesses who appeared at the hearing. Id. at 702. And in Winnick v. Manning, 460 F.2d at 548 (2nd Cir. 1972), the court found it necessary to point out that the particular testimony where cross-examination was at issue, the testimony of a dean, did not raise the real issues of credibility and was not key to the case made against the students. See also Graham v. Knutzen, 351 F.Supp. 642, 669 (D.Neb. 1972) (refusing to permit cross-examination of students for fear of reprisals, but requiring an opportunity to confront and cross-examine faculty). See also Order, 362 F.Supp. 881 (D.Neb. 1973).

Thus, even those jurisdictions which decline to require cross-examination in most cases, following the Dixon principle, will require it where the student charged with misconduct disputes key statements of others.

The developing majority view seems to reverse this assumption, and to require cross-examination except where unusual circumstances make it inadvisable. In DeJesus v. Penberthy, 344 F.Supp. 70 (D. Conn. 1972), the student had been expelled on the basis of written statements of two students who did not appear personally at the hearing. The court said, id. at 76:

> Since critical facts were in dispute and since their resolution could lead to expulsion, the lack of confrontation and cross-examination, in the absence of any justifying circumstances, denied plaintiff due process of law.

The court observed that this rule applied in normal circumstances, and, in dicta acknowledged that unusual circumstances may permit elimination of cross-examination.

The court set for the safeguards, including the right of the student to see a written summary of the testimony, and the following factors which would justify the elimination of cross-examination, id. at 76:

> . . . [T]he Board's conclusion to dispense with confrontation and cross-examination must be based on a good faith decision, supported by persuasive evidence, that the accusing witness will be inhibited to a significantly greater degree than would result simply from the inevitable fact that his accusations will be made known to the accused student.

In a corporal punishment case, the fifth circuit has made it clear that the right to "respond to the witnesses against him, and in some cases . . . to ask them relevant questions" was essential. Ingraham v. Wright, 498 F.2d 248. 268, rehearing en banc granted, 504 F.2d 1379 (5th Cir. 1974).

Another circuit court has also expressly agreed. In Black Coalition v. Portland Sch. Dist. No. 1, 484 F.2d 1040, 1045 (9th Cir. 1973), the court found procedures unconstitutional where they permitted expulsion in the absence of cross-examination. Other cases requiring cross-examination, generally without qualifications include Quintanilla v. Carey, Civil No. 75-C-829 (N.D.Ill., Mar. 31, 1975); Anonymous v. Winooski Sch. Dist., Civil No. 74-86 (D.Vt., Apr. 10, 1974); Marin v. University of Puerto Rico, 377 F.Supp. 613, 623 (D.P.R. 1974) (three judge court); Mills v. Board of Educ., 348 F.Supp. 866, 882-83 (D.D.C. 1972); Fielder v. Board of Educ., 346 F.Supp. 722, 730 (D. Neb. 1972); Givens v. Poe, 346 F.Supp. 202, 209 (W.D.N.C. 1972); Marzette v. McPhee, 294 F.Supp. 562, 565 (W.D.Wis. 1968); Esteban, 277 F.Supp. at 651; Moore v. Student Affairs Comm., 284 F.Supp. 725, 731 (M.D.Ala. 1968); Buttny v. Smiley, 281 F.Supp. 280, 288 (D.Colo. 1968).

Individual Trial

As a general rule, school officials have held individual hearings for individual students, and the issue of the mass hearing, or group hearing, has not frequently become an issue before the courts. In one case, the court refused to permit students to challenge proceedings because of a group hearing, observing that "they were acting with a common purpose" and that they requested to be tried as a group. Id. at 287. In a case where the penalty was imposed upon an entire high school -- suspension from an interscholastic athletic program for one year -- it was also clear that only the high school should receive notice and hearing, and not individual students, although the misconduct of individual students served as the basis for the suspension. Kelley v. Metropolitan County Bd. of Educ., 293 F.Supp. 485, 496 (M.D. Tenn. 1968). The court observed:

> This Court is of the opinion that under the circumstances of this case individual notice and a hearing for each student was not required by due process of law. In cases of possible group misconduct on the part of students due process is satisfied if the notice and opportunity to defend are afforded to a responsible person whose position requires him to represent and speak for the entire group. A school principal occupies such a position.

Public or Private Hearing

It would seem fair to a student who desired to exclude persons not connected with the hearing proceedings to require that the hearing be private. Especially for minors, the desire for privacy and anonymity would clearly outweigh any public interest in keeping the doors to the hearing room open. The issue has not come up in litigation, probably because school officials uniformly agree to this general principle. In contrast, the student who strongly desires to make the hearing public stands on different footing. There are space limitations and considerations of order and atmosphere which would argue for at least limiting the number of observers who may enter the room. On the other hand, however, the exclusion of a limited number of representatives of student newspapers or governing bodies have serious first amendment implications quite apart from the rules of procedural due process. In shaping its general order, the court in Mills v. Board of Educ., 348 F.Supp. 866, 881 (D.D.C. 1972) made it optional with the student's parents:

> The hearing shall be a closed hearing unless the parent or guardian requests an open hearing.

There are a few cases where students have desired open, public hearings and the request was refused. Zanders v. Louisiana State Bd. of Educ., 281 F.Supp. 747, 768 (W.D. La. 1968); General Order on Judicial Standards of Procedures . . . , F.R.D. 133, 146-47 (1968); Buttny v. Smiley, 281 F.Supp. 280, 288 (D.Colo. 1968) (dicta as school officials voluntarily made the hearing public). One court has acknowledged that the student should have been given an open hearing after he requested it, but declined to invalidate the proceedings on this point, because counsel was present and cross-examination permitted. Moore v. Student Affairs Comm. of Troy State Univ., 284 F.Supp. 725, 731 (M.D. Ala. 1968).

Privilege Against Self-Incrimination

Generally in criminal proceedings, police have an obligation to warn suspects of the right to remain silent and refrain from giving testimony against themselves, and if the suspect is not warned and is later tried, any confessions or admissions of guilt gathered by the police will be excluded from evidence. Miranda v. Arizona, 384 U.S. 436 (1966); In re Gault, 387 U.S.1 (1967) (juvenile proceedings). This rule has also been applied in administrative proceedings leading to potentially serious sanctions. Spevak v. Klein, 385 U.S. 511 (1967) (attorney facing disbarment). Cf. Furutani v. Ewigleben, 297 F.Supp. 1163 (N.D.Cal. 1969) (court promised that if students were forced to incriminate themselves at a hearing, they could suppress the statements in a subsequent criminal case).

This rule clearly has not been transferred into the routine concept of procedural due process for student disciplinary hearings. Nonetheless, a student's confession which is obtained by an insistent and overbearing school official cannot be trusted to be accurate. Even if the privilege against self-incrimination is not legally applicable in student disciplinary proceedings, officers hearing student disciplinary cases should give little weight to those confessions obtained from students before they have had an opportunity to consult with a lawyer or some other person. Nor should much weight be given to the argument that such techniques are not illegitimate because the aim is not punishment, but the gathering of information necessary to help the child.

There seems to have been only one case in which a court recognized the likelihood that school officials might intimidate students while investigating a situation. Goldwyn v. Allen, 54 Misc.2d 94,281 N.Y.S.2d 899 (Sup. Ct. 1967). The court indicated a desire to determine whether the student's "confession" had been obtained by duress.

Other authorities have ruled that the hearing need not provide for "warnings about privileges, self-incrimination, application of principles of former or double jeopardy, compulsory production of witnesses, or any of the remaining features of federal criminal jurisprudence." Nor must school officials "advise a student involved in disciplinary proceedings of his right to remain silent and to be provided with counsel." General Order of Judicial Standards of Procedure . . . , 45 F.R.D. 133, 146-47 (1968); Buttny v. Smiley, 281 F.Supp. 280, 287 (D.Colo. 1968).

Finally in Caldwell v. Cannady, 340 F.Supp. 835, 840-41 (N.D. Tex. 1972) the court ruled that a student's refusal to testify before the board should not be construed as an admission of guilt.

Sufficiency of the Evidence

The great weight of authority would require that the findings of fact following the hearing be supported by "substantial evidence." Generally, the reviewing court has cited the "substantial evidence" test without any discussion, and it is not clear that the students pressed for a more rigorous standard. See, e.g., Sill v. Pennsylvania State Univ., 462 F.2d 463 (3rd Cir. 1972); Wong v. Hayakawa, 464 F.2d 1282 (9th Cir. 1972), cert. denied, 409 U.S. 1130 (1973); Esteban v. Central Mo. State Col., 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970) (majority opinion); Givens v. Poe, 346 F.Supp. 202, 209 (W.D.N.C. 1972); DeJesus v. Penberthy, 344 F.Supp. 70, 77 (D.Conn. 1972); Vail v. Board of Educ., 354 F. Supp. 592, 604 (D.N.H. 1973), remanded for fuller relief, 502 F.2d 1159 (1st Cir. 1973; Black Students v. Williams, 335 F.Supp. 820, 824 (M.D.Fla.), aff'd, 470 F.2d 957 (5th Cir. 1972); Bistrick v. University of South Carolina, 324 F. Supp. 942, 950 (D.S.C. 1971); Sullivan v. Houston Ind. Sch. Dist., 307 F. Supp. 1328, 1346; General Order on Rules of Judicial Procedure . . . , 45 F.R.D. 133, 147 (1968); Marzette v. McPhee, 294 F.Supp. 562, 567 (W.D.Wis. 1968); Scoggin v. Lincoln Univ., 291 F.Supp. 161, 172 (W.D. Mo. 1968); Jones v. State Bd. of Educ. of Tenn., 279 F.Supp. 190 (M.D. Tenn. 1968), aff'd, 407 F.2d 834 (6th Cir. 1969); cf. Mills v. Board of Educ., 348 F.Supp. 866, 883 (D.D.C. 1972) ("clear and sufficient evidence").

Generally, these cases also specify that this substantial evidence be adduced "solely" at the hearings. See, e.g., Vail, 354 F.Supp. at 604; Givens, 346 F.Supp. at 209; DeJesus, 344 F.Supp. at 77; Marzette, 294 F.Supp. at 567; Esteban, 277 F.Supp. at 652; cf. United States v. Coffeesville Consol. Sch. Dist., 513 F.2d 244 (5th Cir. 1975) (teacher dismissal). Generally, these decisions do not discuss the issue, and possibly the courts may not be addressing it with precision.

There are a few decisions to the contrary. For example, for corporal punishment, the fifth circuit observed that school officials should find guilt "beyond any reasonable doubt." One reason for this standard was the irrevocable nature of the punishment. Ingraham v. Wright, 498 F.2d 248, 268 (5th Cir. 1974), rehearing en banc ordered, 504 F.2d 1379 (5th Cir. 1974). The court was specifying procedures:

> If the student claims that he is innocent of the conduct which merits punishment, school officials should make sufficient inquiries to insure that, to the contrary, the student is guilty beyond any reasonable doubt. After all, once the student is corporally punished, no retraction of punishment is possible. This means that eyewitnesses should be questioned by the principal or his designee and the student should be allowed to call witnesses in his own behalf. Also, the student should be allowed to respond to the witnesses against him, and in some cases he should be accorded an opportunity to ask them relevant questions. Of course, all of this may take place in an informal setting, and no formal rules of procedure or evidence need be followed.

Finally, in a case involving a search of student's dormitory room without his consent, a district court found hearings preceding expulsion for possession of drugs were defective because of the lack of sufficient probative evidence. The court's opinion absolutely rejected the substantial evidence test, and without determining what the minimal standard would be, ruled that it would at least have to be a "preponderance" of the evidence. Smyth v. Lubbers, 398 F.Supp. 777 (W.D. Mich. 1975) forthcoming (Clearinghouse Review No. 13,702. The judge said, mem. pp. 33-37 (footnotes omitted):

> This case is among the most serious ever likely to arise in a college context. . . .
>
> . . . The court concludes that at least where an adult student is charged by a College with committing an act which is a crime, the Due Process Clause requires that some articulated and coherent standard of proof be formally adopted and applied at the college hearing which determines the student's guilt or innocence of the charge. If such a standard is not adopted and applied, then the college hearing board is totally free to exercise its prejudices or to convict for the purpose of vindicating "order and discipline" rather than on the evidence presented. . . .
>
> . . . .
>
> The first problem with the "substantial evidence" standard is that it is, standing alone, primarily a formula intended for appellate review of trial courts' determinations or judicial review of administrative determinations. Trial courts and administrative agencies have functions different from appellate and reviewing courts. Trial courts and administrative agencies have the original task of resolving conflicts in the evidence and between opposing interpretations. An appellate or reviewing court, in contrast, has the task of determining only whether the trial court or administrative body had a rational basis for its decision. The appellate or reviewing court does not conduct a trial de novo, and resolve conflicting views a second time. See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951). A standard appropriate for a reviewing court to apply to determine whether there is a minimal rational basis for

> decision is not appropriate for an original trier of fact to resolve conflicts in the evidence and between opposing interpretations. The issue before the trier of fact is not whether there is a minimal basis for conviction or whether a conviction would survive appeal or collateral attack. See Jaffe, "Administrative Law: Burden of Proof and Scope of Review," 79 HARV. L. REV. 915, 915 (1966).
>
> The substantial evidence formula standing alone as a standard of proof for the trial court provides no measure of persuasion or degree of proof to guide the court in resolving conflicts to reach its ultimate decisions, but goes only to the quantity of evidence required by the prosecutor. Cf. Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 281-284 (1966). Under the College's rule, the College need only present a certain quantum of evidence (substantial) that a party was guilty as charged, and the All College Judiciary could convict, regardless of what else appeared in evidence. . . .
>
> . . . .
>
> The Court concludes that the College's "Due Process" Rule 14 in the 1973-74 Student Handbook which states, "No disciplinary action shall be taken on grounds which are not supported by substantial evidence" is constitutionally inadequate as a standard of proof because it provides no intelligible standard of proof to guide the All College Judiciary, or because, to the extent that it might embody an intelligible standard, that standard is totally one-sided and is lower than that constitutionally required.
>
> Because the convictions of both Smyth and Smith by the All College Judiciary were based upon constitutionally inadequate standards of proof, the suspensions in accordance with these convictions cannot be enforced.
>
> The court need not and does not reach the question of precisely what standard of proof would be constitutionally adequate under the circumstances of this case. The court is certain that the standard cannot be lower than "preponderance of the evidence.

See also the discussion of evidentiary requirements in Wood v. Strickland, at p.231, supra.

Finding of Fact

There is general agreement among the courts that in a serious disciplinary proceeding, students are entitled to a final written report stating the findings made by the decision maker and the reasons for imposition of the sanction. E.g., Winnick v. Manning, 460 F.2d 545, 576-77 (2nd Cir. 1972); Mills v. Board of Educ., 348 F.Supp. 866, 881 (D.D.C. 1972); Behagen v. Intercollegiate Conf. of Faculty Reps., 346 F.Supp. 602 (D.Minn. 1972); DeJesus v. Penberthy, 344 F.Supp. 70, 76 (D.Conn. 1972); Esteban v. Central Mo. State Col., 277 F.Supp. 649, 652 (W.D.Mo. 1967), approved, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970); Dixon v. Alabama, 294 F.2d 150-159 (if the hearing is not before the board of education a written report is necessary); Anonymous v. Winooski Sch. Dist., Civil No. 74-86 (D.Vt., Apr.10, 1974); French v. Bashful, 303 F.Supp. 1333, 1338-39 (E.D.LA. 1969) modified and aff'd per curiam, 425 F.2d 182 (5th Cir. 1970); Marzette v. McPhee, 294 F.Supp. 562, 567 (W.D. Wis. 1968); Woody v. Burns, 188 So. 2d 56, 58 (Dist. Ct. App. Fla. 1966).

Transcripts

There should be no objection to permitting the student, at his own expense, to make a transcript or recording of the proceeding. Thus, courts have noted specifically that either side may do this. Quintanilla v. Carey, Civil No. 75-C-829 (N.D.Ill. Mar.31, 1975); Esteban v. Central

Mo. State Col., 277 F.Supp. 649, 652; *Marzette v. McPhee*, 294 F.Supp. 562, 567 (W.D. Wis. 1968), or that the student may do so. *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972). The Court in *Mills v. Board of Educ.*, 348 F.Supp. 866, 881 (D.D.C. 1972) ordered the school board to tape hearings (or make some other record) and transcribe it, and make this available to parents on request. See also *Marin v. University of Puerto Rico*, 377 F. Supp. 613, 623 (D.P.R. 1974); *Behagen v. Intercollegiate Cong. of Faculty Reps.*, 346 F.Supp. at 608. However, one court (Judge Carswell) ruled that a stenographic transcription or a recording of the hearing was not required. *Due v. Florida Agr. & Mech. Univ.*, 233 F.Supp. 396, 403 (N.D.Fla. 1963).

A Hearing on the Sanction

In *Taylor v. Grisham*, Civil No., A-75-CA-13 (W.D. Tex., Feb. 24, 1975) (Clearinghouse No. 15,925) (also discussed at p. 215, *supra*), the court voided a suspension of a student for off-campus marijuana use, because, among other reasons:

> . . . the application of any "automatic" permanent suspension rule in this context is violative of the Due Process Clause. The School Board must "bring . . . to bear its independent judgement on the question of what penalty to assess . . . , when a valid school regulation is violated. *Lee v. Macon County Bd. of Educ.*, 490 F.2d 458, 460 (5th Cir. 1974).

On a few occasions, it might seem unnecessary to hold a hearing on the substantive offense itself. But the decision surrounding the sanction -- how severe it should be and whether there are any mitigating circumstances to warrant deferring it -- would still be necessary. Thus, the court in *Farrell v. Joel*, 437 F.2d 160, 163 (2d Cir. 1971) observed that the students had admitted the facts charged, but felt that there should be a hearing on the penalty. In fashioning general rules of procedure for corporal punishment cases, the fifth circuit also noted that, if a student concedes that he has engaged in the particular misconduct charged, and the only decision to make is whether corporal punishment is appropriate, "these decisions are usually made by someone who was not directly involved in the circumstances surrounding the alleged misconduct." *Ingraham v. Wright*, 498 F.2d 248, 268 (5th Cir.), *rehearing en banc granted*, 504 F.2d 1379 (5th Cir. 1974). In a similar case, involving transfer to a non-credit school, the student had "unequivocally" admitted wrongdoing, but the court required some rudimentary procedures to determine whether there were any mitigating circumstances which would warrant a less severe sanction. *Betts v. Board of Educ. of Chicago*, 466 F.2d 629, 633 (7th Cir. 1972).

Written Rules of Procedure

In *Graham v. Knutzen*, 362 F.Supp. 881, 883-84 (D.Neb. 1973) the court ordered the school to adopt some method of informing students and parents of the rules of procedure.

In *Hawkins v. Coleman*, 376 F.Supp. 1330 (N.D. Tex. 1974) the court acknowledged that the school official presiding at the suspension decision should not be someone who was involved in the incident, but the court declined to require that there be a specific written rule to this effect.

The court also refused to order the school to have a rule explaining under what circumstances a hearing must take place prior to the suspension. Id. at 1332.

For a general discussion of court requirements on specificity of rules see Part III(D)(1), at pp. 193-204, supra.

Violation of School's Own Rules

A number of courts have found that for a school system to ignore its own preestablished rules violated procedural due process. Caldwell v. Cannady, Civil No. 5-994 (N.D. Tex. Jan.25, 1972) (Mem. op. at 4) (Clearinghouse Review 7424B) (order), 340 F.Supp. 835, 839 (1972) (opinion and final judgment); Dunn v. Tyler Ind. Sch. Dist., 460 F.2d 137, 143-144 (5th Cir. 1972). Accord McDonald v. NCAA, 370 F.Supp. 625 (C.D. Cal. 1974) (University must follow its own procedural rules before declaring athlete ineligible under NCAA rules); Behagen v. Intercollegiate Conf. of Faculty Reps., 346 F.Supp. 602, 606 (D.Minn. 1972) (same, sanction was denial of practice opportunity).

A similar argument was rejected in Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972), where the court declined "to hold that every deviation from a university's regulations constitutes a deprivation of due process," and noted that "the alleged deviations . . . did not constitute in themselves a denial of due process" and that they were "minor ones and did not affect the fundamental fairness of the hearing." Id. at 550. Cf. Bistrick v. University of South Carolina, 324 F.Supp. 942, 950 (D.S.C. 1971) (issue not definitely resolved as court found de novo hearing cured any defects).

The adverse case may be read as holding that a violation of a system's rules denies due process only when the omitted action was itself constitutionally required (a factor noted in the quoted excerpt from the Winnick case). For example, in Caldwell v. Cannady, the court observed that even in the absence of the school's rules, certain requirements of notice and hearing had to be adhered to. Mem. op. at 4.

Non-Prejudicial Errors

As has been noted in numerous examples cited throughout this note, courts may find a particular necessary element of due process lacking in the hearing which was reviewed, but will decline to invalidate the hearing. This approach could perhaps be compared to the decision of appellate courts in criminal cases deciding that error in the record below was not prejudicial to the defendant's case; usually, in the school cases, the court would cite to ample protections in other ways, and find that the defect was not important.

For example, where the student admits the infraction charged, courts are inclined to permit less than adequate hearings. See, e.g., Farrell v. Joel, 437 F.2d 160, 163 (2d Cir. 1971) (holding, however, that a full hearing on the sanction may still be necessary). In Betts v. Board of Educ., 466 F.2d 629 (7th Cir. 1972) the court upheld an otherwise inadequate process because the student "unequivocally" admitted the wrongdoing. The court ordered, however, that since the sanction imposed (transfer to non-credit school) was discretionary, there was a right to a hearing on mitigating circumstances. The court nonetheless accepted as adequate a conference between school and the mother held the following morning.

Another example of non-fatal defects appears in Boykins v. Fairfield Bd. of Educ., 492 F.2d 697 (5th Cir. 1974), cert. denied, 420 U.S. 962 (1975), where students complained of the hearsay evidence given by a school principal (his investigative report). The court looked at the entire proceeding, observing that students were called in to the hearing with parent or guardian, and the charge was explained, and the student was asked if he understood what school rules were violated. If the student had no questions, the evidence would be presented against him and he would be asked to state whether he had anything to say to contradict it. The same lawyer represented all of the students; he was allowed to cross-examine witnesses who attended and he made no objection to the procedure used. Id. at 700.

One court has observed that written notice two days prior to the hearing may be inadequate but where other aspects of the hearing are fair, the court will not invalidate the disciplinary proceedings. Center for Participant Educ. v. Marshall, 337 F.Supp. 126, 136 (N.D. Fla. 1972).

In Jones v. State Bd. of Educ., 279 F.Supp. 190 (M.D.Tenn. 1968), aff'd. 407 F.2d 834 (6th Cir. 1969), cert. dismissed as improvidently granted, 397 U.S. 31 (1970) (Justices Douglas and Brennan, dissenting), two members of the faculty advisory group who adjudicated the case testified against the students. The court ruled that this "in itself" was not sufficient to constitute a denial of due process. Id. at 200.

In Scott v. Alabama State Bd. of Educ., 300 F.Supp. 163 (M.D.Ala. 1969) the court acknowledged that some of the charges against the students were too imprecise to serve as adequate notice, but upheld the sanction because other parts of the charges were adequate.

In Moore v. Student Affairs Comm. of Troy State University, 284 F.Supp. 725, 731 (M.D.Ala. 1968), the court found that the fact that the school had improperly refused the student's request to have the hearing open to observers, also found that this defect was "ameliorated" by the presence of counsel and the opportunity to cross-examine witnesses.

In Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967), the court refused to invalidate a hearing held without benefit of counsel to assist the student. The court found that "taken as a whole, the other aspects of the hearing were fair."

Winnick v. Manning, as noted at p. 251, supra, found deviations from a school's preestablished rules of procedure to be "minor".

In keeping with the general principle that a single procedural defect will not necessarily taint an otherwise fair hearing, courts have found no prejudice to the student's rights to notice where it could be demonstrated that the student (and parents, where appropriate) had full knowledge of the charged leveled against him. See, *e.g.*, *Davis v. Ann Arbor Public Schools*, 313 F. Supp. 1217, 1226-27 (E.D. Mich. 1970). See also *Buck v. Carter*, 308 F.Supp. 1246 (W.D. Wis. 1970) (students responded cautiously to charges).

In sum, the protean quality of due process does not, as noted at the outset, require a specific rigid procedure be adhered to in every case. While it is certainly advisable for school officials to fashion rules of procedure which take into account all of the elements of due process, a court may uphold a process that fails to do so. The reviewing court should, however, scrutinize the record carefully to make sure that the particular defect was in fact insignificant and did not unduly hamper the student in his or her effort to present a full defense to the charged leveled. Of course, the more severe the penalty, the more rigorous the procedure should be. See p.320, *infra*.

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Center for Law and Education
July 1, 1975

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Appendix to Part IV

B. *Goss v. Lopez* – Plaintiff's Brief

In the

Supreme Court of the United States

October Term, 1973

No. 73-898

NORVAL GOSS, et al.,
APPELLANTS,
v.
EILEEN LOPEZ, etc., et al.,
APPELLEES.

ON APPEAL FROM A THREE JUDGE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

APPELLEES' BRIEF ON THE MERITS

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In the
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APPELLEES' BRIEF ON THE MERITS

Opinion Below

The opinion filed by the District Court has not, as yet, been reported. A copy of the Order and Opinion is reprinted in Appellees' Motion To Affirm as Appendix A.

Statutes Involved

A. Section 3313.66 of the Ohio Revised Code:

> The superintendent of schools of a city or exempt village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school for not more than ten days. Such superintendent or executive head may expel a pupil from school. Such superintendent, executive head, or principal shall within twenty-four hours after the time of expulsion or suspension notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor. The pupil or the parent or guardian or custodian of a pupil so expelled may appeal such action to the board of education at any meeting of the board and shall be permitted to be heard against the expulsion. At the request of the pupil, or his parent, guardian, custodian, or attorney, the board may act upon the expulsion only at a public meeting. The board may hold the hearing in executive session but may act upon the expulsion only at a public meeting. The board may, by a majority vote of its full membership, reinstate such pupil. No pupil shall be suspended beyond the current semester.

B. Section 1010.04 Administrative Guide, Columbus Public Schools:

> 1010.04 — Pupils may be suspended or expelled from school in accordance with the provisions of Section 3313.66 of the Revised Code.

C. The Fourteenth Amendment to the United States Constitution, Section 1, which states, in relevant part:

> —Nor shall any state deprive any person of life, liberty or property without due process of law—

Question Presented

Was the Court below incorrect when it held that the exclusion of Ohio students from school for up to ten (10) days without *any* form of fact-finding hearing was a violation of the Due Process guarantees of the Fourteenth Amendment to the United States Constitution?

Statement of the Case

In the Spring of 1971, during a period of heightened racial consciousness, several schools in the Columbus, Ohio School System were affected by racial confrontation, demonstrations and problems of various sorts. Some school officials responded by issuing blanket suspensions to all identifiable students at a given time or place.[1] Many of these students were innocent victims of these sweeping suspensions,[2] having merely been guilty of being in the wrong place at the wrong time.[3] Since the Ohio Law and the Columbus Regulations failed to provide for any procedural safeguards for these students, they had no

forum to protest their innocence.[4] The result was resort to the courts in the form of this present action.

The students filed suit alleging that their suspension violated the Procedural Due Process requirements of the Fourteenth Amendment to the United States Constitution. More specifically it was alleged that 42 U.S.C. 1983 was violated. Nine named Plaintiffs sued on behalf of a class of Columbus school students who had been suspended in a like manner. Section 3313.66 was challenged directly because it was manifest that in the absence of the statute, no authority existed to exclude children from school,[5] that the statute specifically permited suspensions without any hearing and expulsions without any prior hearings, and that in fact, the statute was relied upon by the Columbus school officials.[6] The students sought a declaration of the section's unconstitutionality, an injunction against its enforcement, and expungement of any reference to the suspensions contained in school files.

The Court, after trial, declared Section 3313.66 and Columbus Regulations in effect at the time of the suspensions unconstitutional on the grounds that they failed to provide for a hearing prior to suspension. The Court further ordered expungement as requested. It is this decision which is presently being appealed.

Although this is a class action challenging an institutional practice embodied in a law and a regulation, it is thought useful to outline briefly the facts surrounding the suspensions of the named Plaintiffs who testified.[7] These facts are offered in order to provide the Court with a better picture of how the law operates. A summary of the facts surrounding the suspensions of four of the named Plaintiffs demonstrates the arbitrariness which the statutes and regulations sanction.

---

[1] Although the Appellees (hereinafter students) never were certain of the exact number of children suspended, one indication is given by the testimony of Dwight Lopez, referred to in the Court's Opinion. (Motion To Affirm, p. 20). Lopez testified that he personally knew more than seventy-five students suspended from one school. (Central High School) on one given day. (Appendix, p. 120).

[2] See, e.g., the testimony of the students who testified at the trial. (Appendix, pp. 119-54).

[3] Typical of this syndrome is the testimony of Dwight Lopez and Betty Jane Crome. (Appendix, pp. 119-37).

[4] Some students did have subsequent conferences (usually ten (10) days or more after the termination of schooling) which were held not to elicit the truth but to determine future goals and placement. (Appendix, p. 114).

[5] See, e.g., § 3313.64 of the Ohio Revised Code which mandates a free education for each child between the ages of 6 and 21, and § 3321.01 which prescribes compulsory education.

[6] See, e.g., § 1010.04 of the Administrative Guide to the Columbus Public Schools set out in the "Statutes Involved" Section of this Brief.

Dwight Lopez testified that on February 26, 1971 he was sitting in the school lunch room at Central High School when some other students entered and started overturning tables.[8] Apparently he was mistaken for a participant, for that afternoon he received a phone call from the school principal informing him that he was suspended and should not return to classes. A letter was also sent that day informing Dwight's parents that Dwight was suspended, that they should keep him home, and that a "conference" would be arranged (at an unspecified time) to determine "what the problems may be." Another letter was mailed

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[7] Four of the original nine representative Plaintiffs testified. It was not felt necessary to present the testimony of all since this case involves an unquestioned practice of suspending students for up to ten (10) days without any hearing; once that was established the major issue of Constitutional propriety was raised; it should also be noted that some of the Plaintiffs had disappeared during the two and one half years between the filing of the Complaint and the trial. Finally, a statement contained in Appellants' Brief should be clarified. On page 3 of Appellants' Brief on The Merits it is asserted that four of the nine were above the age of compulsory attendance. It is true that four were above the age of eighteen, the age set for mandatory attendance. (ORS 3321.01). However, all were below the age of twenty-one. Under Ohio Law (ORS 3313.64) children under the age of twenty-one are entitled to a free public education.

[8] Dwight's testimony from which this summary is extracted is found in the Appendix at pp. 119-31. The letters referred to are Plaintiffs' Exhibits 1A through 1D and appear in the Appendix at pp. 120-25 and 190-93. The exhibits of the Plaintiffs and Defendants contained at pages 191-286 were admitted into evidence by oral stipulation at the beginning of the trial. The Transcript, however, does not record this stipulation. Thus the point at which some exhibits were formally introduced into evidence is not recorded.

on March 1, similar to the first, which directed that Dwight should remain at home and that a conference would, at some unspecified time, be arranged. On March 5 a letter was mailed to the parents informing them that a conference was set for March 8. On March 8 there were demonstrations outside the building scheduled for the "conference" which prevented its being held. Dwight testified that despite attempts by his sister to set another conference, none was ever held. By letter dated March 24, the District informed Dwight that he was to be transferred to "Adult Day School," although he had not requested this.

Dwight was out of school almost one month before receiving permission to return. Dwight testified that he lost credit, was treated as a trouble maker at his new school and was unable to make up his courses as a result of the suspension and transfer.[9] None of his testimony, including his assertion of innocence of any wrongdoing, was ever refuted. No hearing at any time was ever offered or held.

Betty Jane Crome was attending McGuffey Junior High School on March 3, 1971.[10] During the morning of that day, the principal decided to close the school due to disturbances. Betty had nothing to do with the disturbances. On her way home Betty had to pass Linden McKinley Senior High School. Demonstrations were taking place, and Betty stopped to watch. While there, the police swept in and picked up all students who were in the vicinity. Betty was among them. After taking her to the Police Station, the police called Betty's home and told her guardian to pick her up. No charges were ever filed. At the suggestion of the police, the guardian telephoned the school to find out if Betty was suspended. The guardian was told that she was, and a letter confirming that fact was received. The letter indicated that Betty was suspended until March 8 when a "conference" would be held. On March 8 Betty returned to school. This testimony was unrefuted. No hearing to determine the merits of the suspension was ever offered or held. It is worth noting that Betty's "activities" were unrelated to the school she was attending and could not even arguably have prompted an "emergency" suspension.

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[9] Appendix, pp. 122-26.

[10] The testimony of Betty Jane from which this statement derives is found at pp. 131-37 of the Appendix. The letter referred to is Plaintiffs' Exhibit 2A and is located at pp. 131 and 202 of the Appendix.

Deborah Fox was attending Marion-Franklin High School on March 10, 1971.[11] On that day, during the course of some demonstrations, Deborah was suspended from school for a ten (10) day period (until March 19). A letter confirming the suspension was mailed on the same day. No hearing or conference was ever offered or held. On March 19 when Deborah attempted to return to school she was informed that she was suspended for another ten (10) day period. A letter confirming this fact was mailed that same day.[12] Finally by letter of March 23, Deborah was informed that she was to be transferred to South High School. No hearing or conference either preceded or followed either the second suspension or the transfer. Deborah testified that she received zeros for work missed, and that

she had difficulty adjusting to her classes upon her return. (Appendix, pp. 152-53). She also had a permanent notation inserted in her file concerning the suspension. (Appendix, p. 219).

Susan Cooper was suspended from Marion-Franklin High School on March 15, 1971 for a period of ten (10) days.[13] Demonstrations had taken place and Susan was alleged to have been involved. A letter confirming the suspension was mailed to Susan's mother on March 16, setting up a "conference" for March 25, the day scheduled for Susan's return. Susan was out of school for ten (10) days. No hearings or conference designed to elicit the truth was held at any time—either before or after the suspension. Susan testified that she fell behind in her school work, receiving zeros for work missed and was given no opportunity to make up the work. (Appendix, pp. 143 and 147).

The treatment accorded these students is typical with regard to hearings.[14] No hearing or conference designed to elicit the truth of the charges supporting a suspension is given to a student. To the extent that any protestation of innocence is permitted,[15] the institutional practice is to grant an irrebuttable presumption of truthfulness to the person opposing the student.[16]

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[11] The Statement of Facts concerning Deborah Fox is abbreviated because there is testimony by the school principal which controverts that of Deborah. Nevertheless the central fact remains: the student maintains that she engaged in no wrongdoing, but was afforded no opportunity to establish her contention. For Deborah's testimony, see pp. 147-54 of the Appendix. Refutation is provided by the school principal. See p. 102 *et seq.* of the Appendix. Letters referred to are Plaintiffs' Exhibits 3A, 3B and 3C found at pp. 151 and 211 *et seq.* of the Appendix.

[12] Deborah testified that she did nothing on March 19, but merely was told upon her return that her suspension was to continue. The principal maintained that she had been "disruptive." The letter is unusually silent about the reason for the second suspension. (Plaintiffs' Exhibit 3B, Appendix, pp. 151 and 212).

[13] Like Deborah Fox, the testimony of Susan Cooper is controverted by the principal of Marion-Franklin and thus no useful purpose is served by a review of the facts. The same central controlling fact as found in the Deborah Fox story remains: there is a major dispute about the truth, but the student was given no opportunity to contest the suspension. Susan's testimony is to be found at pp. 137-47 of the Appendix; refuting testimony is found at p. 110 *et seq.* of the Appendix. The letter referred to is Plaintiffs' Exhibit 4A and is found at pp. 142 and 224 of the Appendix.

[14] See testimony of John Fulton at pp. 111-14 of the Apepndix. See, also the testimony of Norval Goss at pp. 163-71 of the Appendix.

[15] The student is usually sent to the principal or vice-principal to be informed of his suspension. Although this is merely a step in the suspension process and not viewed as a truth ascertaining procedure, sometimes a teacher might be called in if the student convincingly attracts the attention of the principal. This process is strictly *ad hoc.* (Appendix, pp. 111-14 and pp. 167-71).

The record then seems clear. No hearing is given either prior or subsequent to a suspension. A suspension frequently develops into a longer term exclusion or transfer. It is also clear under the statute in question that no hearing precedes an expulsion. Further, the named Plaintiffs, in varying degrees, showed manifestations of the harms associated with exclusion from school. (see *infra*, p. 33 *et seq.*). Certainly, as Appellants note, all named Plaintiffs graduated. Yet, even by their own exhibit (Appendix, p. 286), six of the eight students who were in school the previous year finished the 1970-71 school year with fewer credits than the previous year, and two, Dwight Lopez and Carl Smith, lost substantial credits. It is notable that three of the nine named Plaintiffs had permanent entries in their records concerning the suspensions. (Appendix, p. 219, Deborah Fox; Appendix, p. 244, Rudolph Sutton; Appendix, p. 256, Tyrone Washington).

Summary of Argument

A. Under this Court's rulings there can be no dispute that education in Ohio is a protected interest entitled to the safeguards of the Due Process Clause of the Fourteenth Amendment. Several decisions have held education to be a protected "liberty", e.g., *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626 (1923); *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954). Given the existence of Ohio legislation establishing the right to education in that state, e.g., Ohio Revised Code, Sections 3313.48, 3313.64 and 3321.01, there can be no question that education is also a protected "property" interest within the meaning of *Board of Regents of State College* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972).

B. Suspension from school is state action which stigmatizes a child as a trouble maker and damages his reputation. Such a stigmatization requires Due Process protection. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971).

C. Deprivation of a protected interest or state action causing stigmatization requires some form of appropriate prior hearing, absent an emergency situation. *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *Wisconsin* v. *Constantineau*, *supra*; *Board of Regents of State College* v. *Roth*, *supra*. Even if an emergency exists, Due Process requires a subsequent hearing. *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870 (1950).

D. There is a high probability that substantial harm will result whenever a child is excluded, through suspension, from this important interest of receiving an education. The obvious loss through deprivation of education coupled with the substantial probability of collateral consequences meets that quantum of harm required to invoke the Due Process clause. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823 (1969) (Harlan concurring); *Fuentes* v. *Shevin*, 407 U.S. 67, 90, 92 S.Ct. 1983, 1999 (1972); and *Board of Regents of State College* v. *Roth*, *supra*. Further, as the District Court correctly recognized, the severity of the deprivation merely goes to consideration of the form of the hearing and not to whether the "root requirement" of a prior hearing should or should not be met. *Roth*, *supra*; *Goldberg*, *supra*.

E. The Ohio legislation declared unconstitutional by the District Court, which provides that a student may be suspended without any hearing and may be expelled without a prior hearing, violates the above-stated precepts of law. Ohio Revised Code, Section 3313.66 and Section 1010.04 of the Administrative Guide of the Columbus Public Schools.

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[16] See testimony of John Fulton. (Appendix, p. 113).

Argument

The students urge this Court to keep in mind several points while considering the arguments advanced herein. First, this case does not directly involve what form of hearing should be prescribed in the case of a suspension. Under this statute and the Columbus regulations, *no* hearing is given either prior or subsequent to a suspension. Thus, the primary issue is whether the Appellees (hereinafter "students") can be deprived of an education, through suspension, without any hearing. Secondly, although the facts surrounding some of the named Plaintiff students might fit within an "emergency" exception to the prior hearing rule, no subsequent hearing was ever offered or given to them. Surely in an emergency situation when nerves might be on edge, and the chance for mistaken or capricious action is heightened, the need for procedural protections becomes that much greater.

I. EDUCATION IN OHIO IS A PROTECTED INTEREST WITHIN THE MEANING OF THE DUE PROCESS CLAUSE.

In *Board of Regents of State College* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972), this Court ruled that one must have a "liberty" interest or a "property" interest in order to invoke Due Process protection. Both reason and this Court's precedents support a holding that education in Ohio satisfies the criterion for each of these interests.

In *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923) this Court, in an often cited passage, defined "liberty" as follows:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge*, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. 262 U.S. at 399 (emphasis added).

In *Pierce* v. *Society of Sisters of the Holy Names*, 268 U.S. 510, 45 S.Ct. 571 (1925), this Court reiterated that education is a liberty within the meaning of the Due Process Clause. In *Bolling* v. *Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954), this Court again held that education was a liberty subject to Due Process protection. Moreover, this Court affirmed this important principle only a year ago in *Roth*, when it quoted approvingly the above-stated definition of liberty from *Meyer*. 408 U.S. at 572. Thus this Court has been consistent in following its acknowledgment in *Meyer* that the "liberty" of the Due Process Clause, at the very least, includes the right to education.

The District, in its Brief on The Merits, tortuously attempts to explain away this line of decisions. It argues that the "liberty" of these cases is a liberty to be free of public education; therefore, the argument goes, a deprivation of public education can not be perceived to be the deprivation of a liberty subject to Due Process protections. To cary this argument to its logical conclusion, the District is forced to argue that even an expulsion need not be protected by Due Process since it is mere exclusion from a non-liberty. (Appellants' Brief, p. 7). This argument falls of its own weight. First, this argument runs counter to every case that has decided this issue, including those cited by the District. The legal dispute in the lower court cases has been whether a short term suspension requires stringent protections, and not, whether education is a protected interest; all courts have either ruled or assumed that it was. See e.g., *General Order on Judicial Standards of Procedure & Substance in Review of Student Discipline in Tax Supported Institutions of Higher Learning*, 45 F.R.D. 133 (W.D. Mo. *en banc* 1968).

Second, to argue that the only educational "liberty" protected by the Constitution is the right to seek an education outside the public schools is to make "liberty" a frail gossamer. Financial limitations would prohibit the great majority of citizens from enjoying this notion of educational "liberty." And, indeed, it seems likely that it was recognition of this fact in part that prompted Ohio to provide for the free education of its youth. ORS 3313.48. To limit the educational freedom protected by the Constitution solely to private searches for knowledge is to rob public education of its heretofore vital and prominent role in our society. It undermines and denegrates this Court's consistent view of public education's vital role expressed so fully in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and reiterated recently in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973). This suggestion by the defendant District is not only an inaccurate view of the law. It is a dangerous inroad on an important protected interest which has long been granted special constitutional protection by this Court.

The right to education in Ohio must be considered to be a "property," as well as a "liberty," interest, subject to Due Process Protection.[17] In *Board of Regents of State*

College v. *Roth*, 408 U.S. 564, 577, this Court ruled that property interests may be derived from statutory entitlements. The Ohio students' right to this vital interest of education is a long and well established entitlement.

A student's right to education in Ohio and the concomitant duty of the state to provide schooling goes back to the origins of that state. The Northwest Ordinance of 1787, which first established a government in that area known today as Ohio, provided in Article Three that "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

The Constitution of Ohio of 1802 in Section Twenty-five (25) of the Bill of Rights provided that equal participation of students should be permitted in schools funded by the United States,[18] and that "all doors of the said schools, academies and universities shall be opened for the reception of schools, students and teachers of every accord . . . ."

The Constitution of 1851, Section Seven (7) of the Bill of Rights, declared "religion, morality and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws . . . . To encourage schools and the means of instruction."

The present Constitution likewise provides that the General Assembly must pass laws to encourage schools and the means of instruction and must provide through taxation for a "thorough and even system of common schools throughout the state of Ohio." (Art. VI, § 2).

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[17] The Appellants assert that the District Court "recognized that education is not a property right." (Appellants' Brief, p. 3). This is not an accurate portrayal of the District Court's holding. Although the Court characterized education as a liberty, it noted that statutory entitlements such as education often take on the incidents of property, citing Reich, *The New Property*, 73 Yale L.J. 733 (1964). (see Motion To Affirm, p. 54, n. 16). The District Court further took notice of the Ohio students' statutory right to an education in discussing the liberty interest. (Motion To Affirm, p. 52, n. 14).

[18] Presumably at that early date schools were primarily funded by the United States.

Present legislation, passed pursuant to these constitutional provisions, clearly imposes a duty on local communities to provide for the education of those children residing therein. Section 3313.48 states:

> The board of education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction . . .

Section 3313.64 states, *inter alia*:

> The schools of each city, exempted village or local school District shall be free to all school residents between six and twenty-one years of age . . .

Not only is there a duty to provide free schooling for the children of Ohio (and, of course, a concomitant right for them to attend), but, as in most states, children are mandated by law to attend. Section 3321.01 *et seq.* of the Ohio Revised Statutes provides that all children between the ages of six and eighteen years of age must attend school and that certain penalties result from non-attendance. In fact, this requirement is considered of such magnitude that in certain instances a parent may be required to post a bond to insure that his child attends school. ORS 3321.48. The state courts have further held that under the Ohio statutory scheme there is not only the right of a child to attend school, but that if poverty interferes with the ability to exercise that right, the public must assume the burden of overcoming this barrier. *Dornette* v. *Allais*, 76 Ohio App. 345, 363-64, 63 N.E.2d, 805, 813 (1945). See also *State* v. *Gans*, 168 Ohio St. 174, 151 N.E.2d, 709 (1958).

In sum, Section 33 of the Ohio Revised Statutes broadly establishes a state-wide mandated system of education.

The clear and unequivocal purpose of this legislation is to insure that the children of the state have the opportunity to grow and develop into contributing members of society. To that end, the legislation ensures their right to an education. It is precisely upon such a statutory entitlement that "property" rights for Due Process purposes have been and should be built. To allow school officials to deprive children of this statutory entitlement without some form of procedural protection is to invite mistaken, capricious or arbitrary action in clear conflict with the concept of entitlement.

In *Board of Regents of State College* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972), this Court specified how a property interest may be ascertained. This Court stated:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in *Goldberg* v. *Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so. 408 U.S. at 577.

The claim of entitlement by those welfare recipients in *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970), was surely no stronger than the claim of these students to the right to attend school.

In *Bell* v. *Burson*, 402 U.S. 533, 91 S.Ct. 1586 (1971), this Court ruled that a driver's license could not be revoked without a prior hearing. As this Court stated:

> Relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege." 402 U.S. at 559.

Again, the entitlement to a driver's license in Georgia was no greater than the entitlement of these students to education in Ohio; and surely the extensive and historical statutory scheme devised to insure the education of Ohio youth is far stronger than the "understanding" found to constitute the basis of an entitlement in *Perry* v. *Sinderman*. 408 U.S. 593, 599, 92 S.Ct. 2694, 2699 (1972).[19]

The plurality holding in *Arnett* v. *Kennedy*, 42 U.S.L.W. 4513 (1974) is based upon factors which are not present in the instant case. In *Arnett*, the plurality held that where the legislative grant of an establishment is inextricably intertwined with the procedures for denying the entitlement, one cannot take the grant without also accepting the procedures. In *Arnett*, such entitlement resulted from the fact that the entitlement and the procedures were simultaneously conferred in the same sentence. (See discussion, 42 U.S.L.W. 4518). Historically, no entitlement preceded development of the procedures. The facts in the present case are starkly different. As outlined *supra*, p. 14, the right to education in Ohio historically dates to the Northwest Ordinance of 1787, was preserved and strengthened by early constitutions, and is encompassed in the present Ohio Constitution. The constitutional right to an education in Ohio is made explicit by the whole legislative scheme found in Section 33 of the Ohio Revised Statutes and particularly by ORS 3313.48, 3313.64, and 3321.01. Section 3313.06 ORS. the Section under attack, stands alone, and does nothing more than prescribe disciplinary procedures. Thus the facts of the instant case are vastly different from those in *Arnett* where the entitlement and the procedures were adopted simultaneously in one sentence.

The statutory right to education in Ohio is thus much better established, both as it presently exists and in its historical antecedents than most of the other entitlements that this Court has designated property interests. In the same sense as welfare is to the welfare recipient, and a driver's license to the driver, education to the Ohio child is "essential(ly) fully deserved and in no sense a form of charity."[20] To allow mistaken, arbitrary or capricious deprivations of education without any form of procedural protection would defy logic.

The Appellants (hereinafter "District") have argued that this Court's ruling in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973), somehow undercuts the assertion that a student's right to education is a protected interest within the meaning of the Due Process Clause. This analysis would contradict this Court's statement in *Rodriguez* that:

> Nothing this Court holds today in any way detracts from our historic dedication to public education. 411 U.S. at 30.

It further ignores the difference between "protected interests" as enunciated in the Due Process cases and

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[19] See also, *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117, 46 S.Ct. 215 (1926) (Right to Practice Law); *Sherbert* v. *Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963) (Right to Unemployment Compensation), holding entitlements to be subject to Due Process Protection.

[20] Reich, Individual Rights & Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1964).

''fundamental interests,'' an equal protection concept. As this Court has made clear, a protected interest may spring from other than a constitutional nexus whereas a ''fundamental interest,'' giving rise to strict equal protection scrutiny, emanates *from* the Constitution. A protected interest receives Due Process protections, when, as is the case of education in Ohio, it is a statutory entitlement, or when as here, reputation and opportunities are limited by state action. This argument of the District also runs counter to several express statements made in the *Roth* and *Rodriguez* decisions.

Previously we discussed this Court's rulings that a property interest may arise from a statutory entitlement. Indeed, in *Board of Regents of State College* v. *Roth*, *supra*, 408 U.S. 564, 577, this Court stated that:

> Property interests, of course, are not created by the Constitution.

The search for a ''fundamental interest,'' for equal protection purposes is, to the contrary, a search for a constitutional nexus; as this Court stated in *Rodriguez*:

> Thus the key to discovering whether education is ''fundamental'' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. *Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.* (411 U.S. 1, 33-34) (Emphasis added).

In fact, in *Rodriguez* this Court apparently anticipated and rejected the assertion now being made by the District.

In a discussion of welfare litigation, this Court noted that in *Dandridge* v. *Williams*, 397 U.S. 471, 90 S.Ct. 1153 (1970), it had rejected the contention that the right to welfare should be treated as ''fundamental'' for equal protection purposes, while contemporaneously ruling in *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970), that the deprivation of welfare was the deprivation of a protected property interest deserving Due Process protections. See discussion in *Rodriguez*, *supra*, 411 U.S. at 33 n.72. As in the case of welfare, the right to a driver's license is not ''fundamental''; yet as the Court acknowledged in *Bell* v. *Burson*, *supra*, 402 U.S. 535, it is a statutory entitlement subject to Due Process protections. Likewise, education in Ohio is a statutory entitlement and should be accorded, at a minimum, the same protections.

It is, of course, reasonable that a ''protected interest'' under the Due Process Clause be different from a ''fundamental interest'' under the equal protection clause. The purposes and orientation of those two clauses are different. On the one hand, procedural due process is designed to protect the individual against arbitrary or mistaken governmental decision-makers; on the other hand the equal protection clause aims to insure that like-situated persons receive similar treatment.

Different as the orientation is between the two clauses, the purpose served by the ''fundamental interest'' designation is unique to the equal protection clause. That purpose is to provide a framework for measuring the degree of justification the state must give when it treats groups or individuals differently. If a ''fundamental'' or constitutionally-based interest is involved, the state has a higher burden of justification than if a non-fundamental interest is involved.

This whole framework and its reason for existence has no applicability to the measurement of, or need for, procedural safeguards under the Due Process Clause.

II. A School Suspension Is Stigmatizing and Results in a Loss of Reputation: as Such, It Requires Due Process Protection.

In *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971), this Court stated:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him notice and an opportunity to be heard are essential.

This statement in *Constantineau* was a reiteration of principles enunciated in *Weiman* v. *Updegraff*, 344 U.S. 183, 191, 73 S. Ct. 215, 218-219 (1952), and *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168, 71 S. Ct. 624, 646 (1951) (Frankfurter, J. concurring).

Although explicit psychological testimony is not required to establish that a suspension officially stamps a child as a "trouble maker," several prominent psychologists did testify at the trial to confirm that the stigma is this, and may be much more. Dr. Herbert Rie, the Chairman of the Section on Child Development and Psychology, Childrens' Hospital, Columbus, Ohio and Professor in the Department of Pediatrics & Psychology at Ohio State University, testified that this labeling by teachers had the potential of serious educational consequences and could also adversely affect the child's dealings with his family, neighbors and peers.[21] Indeed, this seems so basic that one would expect it to have served as the judicial basis in other Due Process exclusion cases, and it has. In what is probably the leading case in the area of school exclusion, *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961), the basis for providing Due Process protections to an excluded student was the recognition of the stigma that was likely to attach to the student. See also, *Vought* v. *Van Buren Public Schools*, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969); *Cf. Breen* v. *Kahl*, 296 F. Supp. 702, 707 (W.D. Wisc. 1969), aff'd, 419 F.2d 1034 (7th Cir. 1969).

In the preparation for this brief, Counsel for the students surveyed other more concrete forms of harm that result from a suspension. Although detailed discussion of the findings will be deferred to that section dealing with harm and its application to this case,[22] we note that a substantial probability exists that a suspension of a high school student may limit both college and employment opportunities. This is further substantiated by the testimony of Floyd Horton, a former Counselor in the Columbus Public School and presently a Doctoral candidate in the School of Educational Administration at Ohio State University.[23]

In sum the designation of a student as "suspended" by definition is a negative label which has the substantial potential of causing serious harm. It is the sort of stigma that should receive some prior procedural protection under the rule of *Constantineau*.

III. Due Process Requires a Prior Hearing Whenever a Protected Interest Is Invaded or a Stigma Imposed — Absent Extraordinary Circumstances.

There is probably no principle more firmly embeded in the law than the requirement that the invasion of a protected interest be preceded by some form of Due Process protection. Under the state legislation herein attacked neither a prior nor subsequent hearing is accorded a suspended student, and only a subsequent hearing is accorded an expelled student. Clearly this treatment runs afoul of the principle.

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[21] Appendix, pp. 171-82. See also, the testimony of Dr. Robert Woody on this point, Appendix, pp. 154-162.

[22] *Infra*, p. 29.

[23] Appendix, pp. 182-88.

In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950), this Court stated:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require the deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820 (1969), this Court ruled that a wage garnishment must be preceded by some form of adequate procedural protection. In *Sniadach*, unlike the present case, there was at least the opportunity for a subsequent hearing.

In *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970), this Court ruled that the termination of welfare benefits must be preceded by Due Process protections. It is notable that the protections that were offered, but found to be inadequate in *Goldberg*, were extensive compared to the nonexistent protections offered to a student in Ohio. In *Goldberg*, the welfare recipient was entitled to seven (7) days written notice of the intent to discontinue benefits, the right to a personal meeting with a case worker prior to the discontinuance, the right to file a written statement with a supervisor, and the right to a post termination hearing. The suspended student in Ohio has *no* protection.

In *Boddie* v. *Connecticut*, 401 U.S. 371, 378-79, 91 S. Ct. 780, 786 (1971), this Court stated:

> That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. (Footnote omitted)

In *Bell* v. *Burson*, 402 U.S. 535, 542, 91 S. Ct. 1586, 1591 (1971), this Court ruled that a hearing must precede the deprivation of a drivers license; this was despite the fact that procedures were in existence which were more protective than here. In *Bell* there was a prior hearing to determine whether the person whose license was to be revoked was properly identified. There is not even this minimal protection for the Ohio student.[24]

In several recent cases this Court has explicitly reaffirmed the principle that Due Process requires some form of a hearing prior to the deprivation of a protected interest. In *Fuentes* v. *Shevin*, 407 U.S. 67, 82, 92 S. Ct. 1983, 1995 (1972), this Court stated:

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[24] Although the concurring opinion by Justices Powell and Blackmun in *Arnett* v. *Kennedy*, 42 U.S.L.W. 4513 (1974), denies the right of a full scale trial-type hearing prior to the dismissal of a civil service employee, it is notable that the employee had extensive pre-dismissal and post-dismissal rights in comparison to the students in the present case. Those rights included: (a) written notice of charges, (b) access to materials upon which charges are based, (c) the right to respond orally and in writing to the charges, and (d) the right to present affidavits. All of the above-listed rights accrued before dismissal. After dismissal the employee had the right to a full scale evidentiary hearing. The student in Ohio has absolutely no rights under 3313.66 ORS.

> The Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided *before* the deprivation at issue takes place. (emphasis added)

Finally, in *Board of Regents of State College* v. *Roth*, 408 U.S. 564, 570-71, 92 S. Ct. 2701, 2705 (1972), this Court stated:

> When protected interests are implicated the right to some kind of prior hearing is paramount.

This Court has recognized a limited exception to the above-stated rule whenever emergency circumstances exist.[25] The District Court recognized that if a narrowly defined emergency did exist prior procedures need not be utilized, but that a subsequent hearing must be held.[26] This is a reasonable approach; but, of course, the statute under attack is not limited to emergencies.

This Court's development of the prior hearing principle is obviously predicated upon a recognition that once the deprivation has taken place it is virtually impossible to make the person whole by a subsequent proceeding. As stated in *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965):

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[25] See, e.g., *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554, 41 S.Ct. 214 (1921); *Phillips* v. *Commissioner of IRS*, 283 U.S. 589, 51 S.Ct. 608 (1931); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870 (1950).

[26] Appellees Motion To Affirm pp. 60-61. Indeed, the need for a hearing is increased when resort is to an emergency suspension; as Justice Frankfurter stated in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 171 "[The opportunity to be heard] should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe" (Frankfurter, concurring).

> A fundamental requirement of due process is the "opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

As in the cases enunciating this Due Process principle, irreparable loss will be suffered through a suspension that cannot be completely remedied by a subsequent adjudication of innocence.[27] As the chief witness for the District, Norval Goss, conceded:

> Any absence from school can, of course, have negative effects and that would include suspension from school.[28]

It is not reasonably to be expected that a teacher will be fully able, or even likely motivated, to compensate for the time missed from school;[29] a day lost is a day lost no matter how one views it.

Further, although some mitigation of the psychological harms inherent in an unjust suspension might be expected from a subsequent hearing, it is not possible for the child to be made whole. For a child to be declared innocent of wrongdoing after having been irreparably excluded from school for a period of time would inevitably appear to be administrative double-talk. The potential psychological fall-out would seem to be far from speculative.

No reason, either administrative or substantive, thus exists why the "root requirement" of a prior hearing, denied by the Ohio Statute, should be dispensed with when a child is suspended from school — absent a narrowly defined emergency.

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[27] It should, of course, be remembered that there is no provision for even a subsequent hearing in the case of a suspension under the Ohio legislation.

[28] Appendix, pp. 165-66.

[29] See, e.g., testimony of Floyd Horton, Appendix, p. 184.

The basic purpose underlying the Due Process Clause is to avoid arbitrary, capricious, mistaken or authoritarian infringements of significant interests such as education. Recent studies and decisions show that just such infringements do take place in the educational sphere. In fact a major study recently published concludes that:

> There are strong indications, however, that suspension and expulsion have been used as weapons of discrimination, especially in resisting increased desegregation and in some instances during protests for more general students' rights.[30]

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[30] The Student Pushout, Victim of Continued Resistance to Desegregation, published by the Southern Regional Council and the Robert F. Kennedy Memorial, 1973, p. VIII (hereinafter Study). The statistics supporting this conclusion show a startling disproportion of minorities being suspended and/or expelled. In Little Rock, Ark. in 1971-72 blacks comprised 33.4% of the high school students. 79.9% of the students suspended were black. (p. 2 Study). Although the Richland County, South Carolina (Columbia) District was almost evenly split between blacks and whites in the first half of the 1972-73 school year 1,519 blacks were suspended while only 445 whites were similarly treated (77% black, 23% white) (pp. 3 & 4 Study). In Dallas, Texas a review of HEW 101 Forms showed that 9.1% of the blacks; 6.4% Chicanos and 4.9% of the whites were expelled in 1971-72. (Study, p. 4). In fact an analysis by the Office of Civil Rights of HEW of these forms nation-wide concluded that "the expulsion rate for minority students was twice that for non-minority students, and the expulsion rate for black students was three times that for non-minority students." (Study, p. 5). Indications are that this is not merely a Southern Desegregation Phenomenon. In Omaha, Neb. in 1970-71, 8% of the minority children were expelled from school while only 2.1% of the non-minority children were expelled (Study, p. 6). Other studies have noted the same disproportions. In 11 Integrated Education, 30 "Race and Suspension in New Orleans" it was reported that 15.3% of the black population was suspended in 1971-72 while 8.8% of the white population was suspended. See also the Report of the Select Committee on Equal Educational Opportunity, United States Senate, "Toward Equal Educational Opportunity." (Dec. 31, 1972) at p. 140.

A recent decision by the Commissioner of Education of New York State acknowledged that handicapped children were being improperly suspended from the schools of New York City. *In The Matter of The Appeal of Reid et al.*, No. 8742, New York State Education Department, filed Nov. 26, 1973.

A brief review of some of the leading suspension-expulsion cases shows a clear pattern of the misuse of these sanctions to stiffle First Amendment Rights. In fact, this Court's decision in *Tinker* v. *Des Moines Independent Comm. School Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969), arose from a suspension, and the decision in *Papish* v. *Board of Education*, 410 U.S. 667, 93 S. Ct. 1197 (1973) emanated from an expulsion. See also, *Quarterman* v. *Byrd*, 453 F.2d 54 (4th Cir. 1971); *Shanley* v. *Northeast Ind. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972); *Scoville* v. *Bd. of Ed.*, 425 F.2d 10 (7th Cir. 1970), and *Hatter* v. *Los Angeles City High School Dist.*, 452 F.2d 673 (9th Cir. 1971).[31]

In sum, school officials are not immune from the same human vices or foibles that have given rise to a recognition of the need for Due Process protection in other areas. They can and do make mistakes, they can and do act arbitrarily or discriminatorily. Students should not be deprived of an education without at least being afforded some degree of procedural protection.[32] It is educationally counter-productive to permit arbitrary action without constitutional protections. As this Court stated in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 637, 63 S. Ct. 1178, 1185 (1943):

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[31] Professor Charles Allan Wright, in discussing the need for procedural protections for the disciplined student observes that, "without procedural safeguards the substantive protection would be virtually useless. There would be no point in an elaborate doctrine that students may be disciplined for disruptive action but not for mere expression if some administrators were permitted to make an *ex parte* and unreviewable determination that particular behavior was 'disruptive action' and that a particular student had participated in it! In a system of ordered liberty, therefore, it is essential that substantive rules we applied through fair and reliable procedures." Wright, "The Constitution on Campus," 22 Vand. L.R. 1027, 1059-60 (1969),

> The Fourteenth Amendment as applied to the States, protects the citizen against the State itself and all its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

To permit suspensions without providing constitutional protections against arbitrariness surely teaches youth to discount important principles of our government as mere platitudes.

IV. THE DISTRICT COURT CORRECTLY RULED THAT "THE MAGNITUDE OF THE DEPRIVATION AFFECTS THE FORMALITY AND COMPREHENSIVENESS OF THE DUE PROCESS SAFEGUARDS; IT DOES NOT AFFECT THE BASIC FACT THAT THESE SAFEGUARDS SHIELD THE STUDENT FROM ARBITRARY OR CAPRICIOUS INTERFERENCE WITH HIS RIGHT TO EDUCATION."[33]

This Court has forcefully and consistently held that the extent of deprivation of a protected interest does not affect the root requirement of some form of prior hearing; absent a finding of *de minimis* harm, not applicable in a school suspension setting, the element of harm is properly considered only in determining the formality of the procedures required.

In *Boddie* v. *Connecticut*, 401 U.S. 371, 378-79, 91 S. Ct. 780, 786 (1971), this Court stated:

> The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interests, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. (footnote omitted)

In *Fuentes* v. *Shevin*, 407 U.S. 67, 85-86, 92 S. Ct. 1983, 1997 (1972), this Court, in an observation that has special poignancy in the immediate case stated:

> The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. *While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not*

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[32] It is true, as Appellants note, that no evidence was before the lower court concerning racial discrimination or First Amendment infringements. Yet the clear evidence of misuse of suspension procedures points up the need for procedural protections in general; and, of course, there was evidence before the lower court of arbitrary, mistaken suspensions.

[33] Appellees' Motion To Affirm, p. 55.

> *decisive of the basic right to a prior hearing of some kind.* (emphasis added)

Finally in *Roth, supra,* this Court stated:

> . . . and a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. 408 U.S. at 570.

In a footnote to this quote, this Court made clear just when the weighing process takes effect. This Court stated:

> The Constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest of course, does not depend upon such a narrow balancing process. 408 U.S. at 570, n. 8.

The District has cited several cases which hold that when 'grievous loss' is suffered Due Process protections must apply.[34] This does not contradict the above statements. If 'grievous loss' means great loss then surely it is encompassed within the ambit of these cases. The District however argues that at a minimum great loss (grievous loss) must be suffered before Due Process protections apply. This interpretation contradicts the above holdings and ignores several other recent statements indicating what the correct threshold of injury should be.

In *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 342, 89 S. Ct. 1820, 1823 (1969), Mr. Justice Harlan stated that any deprivation that could not be characterized as "*de minimis*" must be preceded by a hearing. This concurring view was adopted and reiterated by the majority

in *Fuentes* v. *Shevin, supra,* 407 U.S. at 90, n. 21, where it was stated:

> The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. See, e.g., *Boddie* v. *Connecticut,* 401 U.S. 371, 378, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 and cases cited therein. But *some* form of notice and hearing — formal or informal — is required before deprivation of a property interest that "cannot be characterized as de minimis." *Sniadach* v. *Family Finance Corp., supra,* 395 U.S., at 342, 89 S. Ct. at 1823 (Harlan, J. Concurring).

The approach suggested by the School District would throw the entire law of Due Process into chaos, result in increased litigation and burden governmental officials with an impossible task of determining when process is due. It would appear to be a virtually impossible mental task to determine whether an interest is so important, and an invasion so serious, as to require a prior hearing when those exact same elements must be weighed in determining the form of the hearing. It is submitted that the present flexibiity as to form creates a degree of uncertainty for both government officials and those affected by governmental activity that would become an impossible quagmire if it were carried over into the basic question of whether any hearing is required. This Court's previously-cited decisions wisely avoid this result.

There can be little question that the deprivation of education for even a short time, creates harm more than *de minimis* harm. When one considers the certain harm from loss of schooling and the substantial likelihood of collateral consequences it becomes manifestly irrational to argue against the need for procedural protections.

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[34] *Morrissey* v. *Brewer,* 408 U.S. 471 (1972); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

The direct, immediate, and certain effect of a suspension is that the child is excluded from education for a period of time. For the marginal child who is most likely to be affected by a mistaken or arbitrary suspension, several days of missed schooling might well defeat any chance he has of keeping up with the class; even for other children, the exclusion from school is unlikely to be compensated. Not surprisingly, the record discloses that overworked teachers are unlikely to take the time to help the student overcome his absence;[35] even if such efforts were made, the important give and take of classroom discussion is certain to be lost.[36] The chief witness for the District conceded the possibility of educational harm.[37] In terms of grades, the standard practice in Columbus, as in many districts, is to give zeros for all work missed.[38]

The potential phychological harm was well documented at the trial. The District Court summarized the unrefuted testimony of two prominent Ohio Phychologists as follows:

> The effects of suspension are not uniform. Most suspended students respond in one or more of the following ways:
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> 1. The suspension is a blow to the student's self-esteem.
> 2. The student feels powerless and helpless.
> 3. The student views school authorities and teachers with resentment, suspicion and fear.

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[35] See testimony of Floyd Horton, Appendix, p. 184.

[36] See *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 641 (1950); and *Brown* v. *Board of Education*, 347 U.S. 483 (1954), recognizing the immeasurable importance of classroom discussion and interchange.

[37] See testimony of Norval Goss, Appendix, pp. 165-66.

[38] Appendix, pp. 164-65.

> 4. The student learns withdrawal as a mode of problem solving.
> 5. The student has little perception of the reasons for the suspension. He does not know what offending acts he committed.
> 6. The student is stigmatized by his teachers and school administrators as a deviant. They expect the student to be a trouble maker in the future.
>
> A student's suspension may also result in his family and neighbors branding him a trouble maker. Ultimately repeated suspension may result in academic failure.[39]

A school suspension, regardless of length, can also have negative consequences on college admissions and upon future employment opportunities. A survey taken by the Students' Counsel in the preparation of this brief revealed that four (4) of twelve (12) randomly chosen Ohio Colleges ask expressly on undergraduate application forms whether the applicant has ever been suspended from school.[40] In addition, virtually all colleges asked for tran-

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[39] Appellees' Motion To Affirm, p. 40. See testimony of Dr. Robert Woody, Appendix, p. 154 *et seq.* and Dr. Herbert Rie, Appendix, p. 171 *et seq.* See also, a sampling of the literature in support of these theses; Flowers, C.E., "Effects of An Arbitrary Accelerated Group Placement on The Tested Academic Achievement of Educationally Disadvantaged Students." Unpublished Doctoral Dissertation, Teachers College, Columbia Univ., 1966; Masling, J., "Differential Indoctrination of Examiners and Rorschach Responses," 29 *Journal of Consulting Psychology*, 198-201 (1965); Merton, R.K., "The Self-Fulfilling Prophecy," 8 *Antioch Review* 193-210 (1948); Rosenthal, R., *Experimenter Effects In Behavioral Research* (New York: 1966); Rosenthal, R. and Lenore Jacobson, "Teachers' Expectancies: Determinates of Pupils' I.Q. Gains," 19 *Psychological Reports* 115-118 (1966).

[40] The application forms for the following schools were received. A "yes" indicates that they expressly ask information about High School suspensions. A "no" indicates that nothing is expressly asked:

Antioch—yes; Bowling Green Univ.—no; Case Western—yes; Univ. of Cincinnati—no; Cleveland State—no; Hiram—no;

scripts and asked for school officials to evaluate the student's character and fitness. A suspension might well appear on a transcript or be relied upon by the school official making such an evaluation.[41] Furthermore, the record indicates that students suspended at certain times of the year may irremediably miss certain tests, contests or conferences which have a bearing on college admissions and/or the possible receipt of financial aid.[42] A suspension thus has the substantial probability of causing negative consequences for the college applicant.

The student who decides to seek employment after high school may also suffer harm from an unjust suspension. A review of the basic form book for personnel officers indicates that high school reference checks often ask about the disciplinary problems of the applicant while he was a student.[43] A school official working from a record might well report improper suspensions and thus limit the possibility of employment for the student.

Several other potential consequences that may flow from a suspension have been noted by various studies. One study has observed that:

> While hard data is very rare, a substantial cause and effect relationship does appear to exist between students who are suspended or expelled, on the one hand,

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Oberlin—no; Kent State—yes; Ohio State—no; Otterbein—no; Ohio Wesleyan—yes; Ohio Univ.—asked about College dismissal; The one non-Ohio school surveyed, Harvard College, expressly asks the applicant if he has been suspended.

[41] One example of how a suspension may continue to haunt a student, irrespective of its propriety, is shown by the student records of three of the nine named Plaintiffs. Their records have express notations indicating the existence of the suspensions. See Appendix, at pp. 219, 244 and 256.

[42] Testimony of Floyd Horton, Appendix, pp. 182-88.

[43] Marting, AMA Book of Employment Forms, American Management Assn., 1967. See especially p. 423 *et seq.*

> and students who become labeled as dropouts on the other. This is an area in urgent need of extensive in-depth research.[44]

Others have noted that students not attending school have an increased likelihood of police contact. A summary of the results of a Public Hearing in Illinois, at which twenty-six child service professionals testified, concluded that:

> Those testifying based their remarks on their experience and observation, consequently there are many different and divergent opinions noted throughout the testimony.
>
> It was made clear however, the juveniles out of school as the result of truancy, expulsion or suspension have police contact for any number of offenses.[45]

The Student-Appellees do not contend that every one of the potential harms listed-above will happen to every suspended student. In fact, only the educational loss is certain to happen. There is however a substantial probability that any one or combination of these harms may result from a suspension.[46] Not one of these harms, especially the educational, can be characterized as *de minimis*.

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[44] "The Student Pushout: Victim of Continued Resistance to Desegregation," Published by the Southern Regional Council and the Robert F. Kennedy Memorial, 1973.

[45] Remarks and excerpts from Public Hearings on Truancy & Expulsion, Educational Service Region, Cook County, Chicago, Illinois. Dec. 13 and 14, 1972, published in ERIC ED 078926.

[46] It is notable that the "harms" envisioned flowing from a garnishment, *Sniadach, supra*, 395 U.S. 337 (1969), welfare cutoff, *Goldberg, supra*, 397 U.S. 254 (1970), or driver's license revocation, *Bell, supra*, 402 U.S. 535 (1971), were not certain to follow. Certainly not every employee had his back driven to the wall by a garnishment or was in dire straits as a result of a welfare cut-off or license revocation. In fact, it seems more certain that a suspension will cause some harm than those acts.

Various lower courts have noted the existence of these harms. In *Hatter* v. *Los Angeles City High School District*, 452 F.2d 673, 674 (9th Cir. 1971), the Ninth Circuit noted that evidence of disciplinary action in a student's records may "threaten prejudice with respect to college admissions and future employment." The court in *Sullivan* v. *Houston Indep. School Dist.*, 307 F. Supp. 1328, 1338 (S.D. Tex. 1969), noted that "collateral consequences" may flow from a suspension.

In *Vail* v. *Board of Education of Portsmouth School District*, 354 F. Supp. 592, 603, n. 4 (D.N.H. 1972), the Court found that, in addition to the immediate educational consequences:

> . . . the record of the suspension may jeopardize a student's future employment and educational opportunities as guidance counselors prepare student recommendations after having examined the student's permanent record file which contains the notice of suspension.

In *Shanley* v. *Northeast Ind. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960, 967, n. 4 (5th Cir. 1972), the Court, while abjuring a formula for determining whether a harm is major or minor, found that:

> . . . a suspension of even one hour could be quite critical to an individual student if that hour encompassed a final examination that provided for no "make-up." We are convinced here that the three-day suspensions issued to these five high school seniors, who were in the process of applying to and interviewing for college admission and for scholarships, constitute a justiciable penalty under any "major/minor" dichotomy.

See also *Breen* v. *Kahl*, 296 F. Supp. 702, 707 (W.D. Wisc. 1969), *aff'd*, 419 F.2d 1034 (7th Cir. 1969).

Harm, far exceeding *de minimis*, is thus substantially certain to flow from a suspension, irrespective of length. The degree of harm and the certainty of harm undoubtedly increases substantially if the suspension is viewed as arbitrary, capricious or mistaken. Some form of prior procedural protection is manifestly necessary to avoid or mitigate these harms.

V. THE LOWER COURT CASES STARKLY SHOW THE NEED FOR A PRIOR HEARING RULE.

The lower court decisions, insofar as they provide guidance for this Court, present an irrefutable argument for a prior hearing rule. These cases, by their very inconclusiveness and judicial arbitrariness show the unworkability of a conceptual framework that attempts to measure harm and to place such measurement into a formula for determining whether a prior hearing is required. The decision by the lower court in the present case in its reliance upon this Court's precedents presents a stark contrast to the judicial uncertainty found in many other decisions.

Most lower court cases until recently have attempted to measure harm by the length of time out of school. While harm unquestionably increases as the exclusion grows longer, the evidence before the District Court in this case, and the other indicia of harm presented, *supra*, are clear proof that harm is not purely or even mainly a function of time. An unjust one day suspension under certain circumstances can be devastating. Further, as the cases show, the equating of time with harm results in a purely subjective and arbitrary determination.

The recent law of the Fifth Circuit, the Circuit which has heard more suspension cases than any other, points up this problem. In *Black Students of N. Ft. Meyers Jr.-Sr. High School* v. *Williams*, 335 F. Supp. 820, *aff'd per curiam*, 470 F.2d 957 (5th Cir. 1972), the Court held that a suspension of ten days was a suspension for "a substantial period of time" and this was in violation of the Due Process Clause if not preceded by a hearing. In *Murray* v. *West Baton Rouge Parish School Board*, 472 F.2d 438 (5th Cir. 1973), the Court ruled that suspensions that were for not "more than a few days," 472 F.2d at 443, need not be preceded by a hearing. In *Shanley* v. *Northeast Ind. Sch. Dist., Bexar County, Tex.*, 462 F.2d 960, 967 n. 4 (5th Cir. 1972), as previously noted *supra*, the Court ruled that a three-day suspension under the facts of the case was of such a magnitude that it constituted a "Justiciable Penalty." The dilemma is manifest. It is a subjective and necessarily arbitrary judicial determination to say that after a given number of days, such harm gives rise to the need for a prior hearing. It is unworkable to have a determination made on a case by case basis. Further, the length of the suspension is only one ingredient in determining harm. It is submitted that only a prior hearing rule makes sense and avoids this dilemma.

The pattern discerned in the Fifth Circuit is a pattern that can be traced nationwide. In the District of Columbia, for example, a student may not be suspended for more than two (2) days without being given a rather extensive hearing, *Mills* v. *Board of Educ. of District of Columbia*, 348 F. Supp. 866, 878 (D.D.C. 1972), while a decision in the Tenth Circuit, *Hernandez* v. *School Dist. No. One, Denver, Colo.*, 315 F. Supp. 289 (D. Colo. 1970), rules that a statute which permits suspension for up to twenty-five days without any hearing does not violate Due Process.

Compared with this subjective ill-conceived search for a necessarily arbitrary number of days, the District Court's holding in the present case presents a stark, reasoned contrast. The Court below stated:

> It is important to remember that even though the interference with the liberty of a right to education is limited, the student's right to be treated with procedural fairness prior to a deprivation of the right to an education is not lost. The magnitude of the deprivation affects the formality and comprehensiveness of the due process safeguards; it does not affect the basic fact that these safeguards shield the student from arbitrary or capricious interference with his right to education.[47]

Several recent decisions are in substantial accord with the ruling in this case. In *Vail* v. *Board of Education of Portsmouth School District*, 354 F. Supp. 592, 603 (D. N.H. 1973), the Court ruled that prior to any suspension an "informal administrative consultation" must be held. In *Pervis* v. *La Marque Independent School District*, 466 F.2d 1054, 1058 (5th Cir. 1972), the Court stated that:

> When the punishment to be imposed is minimal, *full* compliance with the requisites outlined in *Dixon* is not required. See note 3, *supra*. Moreover it may be that a student can be sent home without a hearing for a short period of time if the school is in the throes of violent upheaval. But even in such a case, a hearing

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[47] Appellees' Motion To Affirm, p. 55.

would have to be afforded at the earliest opportunity. Cf. *Dunn* v. *Tyler Independent School Dist.*, 5 Cir., 1972, 460 F.2d 137. (emphasis added)

In sum, the lesson to be learned from most of the lower court decisions is that any attempt to inject the question of harm into the question of whether any prior hearing should be given as opposed to the determination of the form of a hearing is doomed to result in an impossibly subjective determination. This points up the reasonableness of retaining this Court's long standing prior hearing rule. Several of the more recent decisions, in addition to that of the instant case, support this proposition.

VI. A STATUTE WHICH PERMITS A DEPRIVATION OF A PROTECTED INTEREST WITHOUT ALSO PRESCRIBING CONSTITUTIONAL PROCEDURES IS FACIALLY INVALID.

This Court has long held that a statute which permits the deprivation of a protected interest without also prescribing adequate Due Process protection is facially invalid. Ohio Revised Statute 3313.66, by providing for a deprivation of education without providing procedural safeguards for the student is thus invalid on its face.

In *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 35 S.Ct. 625 (1915), a Florida statute permitted a judgment creditor to execute on the property of a stockholder of a corporation which had no assets. The statute did not specifically prescribe constitutionally adequate procedural protections for the stockholder. This Court held that this lack of specificity voided the statute. Although recognizing that in given cases, and indeed in the case before it, the stockholder could receive adequate notice and opportunity to challenge the execution, the Court nevertheless held the statute violated Due Process. In so holding, this Court quoted from several earlier decisions requiring adequate

procedures to be spelled out in the statute permitting the deprivation. See especially the discussion at 237 U.S. 629.

This same principle was recently implicitly recognized in *Wisconsin* v. *Constantineau*, *supra*, 400 U.S. 433 (1971), where this Court struck down, as facially invalid, a statute permitting an invasion of the liberty of reputation without also prescribing adequate procedures.

Likewise in *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972), the Florida and Pennsylvania replevin statutes were held to be facially defective for they permitted an invasion of a protected property interest without prescribing adequate procedures.

Thus, given the protected nature of education in Ohio, and the deprivation thereof permitted by ORS 3313.66 it is manifest that the Section is facially invalid for failing to prescribe constitutionally sufficient protections.

Conclusion

Both reason and this Court's ample precedents require a holding that a school suspension without any form of notice or hearing violates the Due Process Clause of the Fourteenth Amendment.

Under express holdings of this Court, and under the rationale used to support those holdings, education in Ohio must be considered to be a protected interest. Further, common sense and the evidence in the record lead inexorably to the conclusion that a suspension creates the sort of stigma that should be protected against.

This Court has invariably required that a hearing of some form must precede the deprivation of a protected interest or the imposition of a stigma. No reason exists for a variation from this requirement.[48] We would only note that it is not the deprivation of a minor interest that is herein involved but rather an interest so important that this Court has observed that:

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[48] The issue here, of course, is whether a student can be suspended without any hearing. If the Court feels compelled to discuss the

> In these days, it is doubtful that any child may reasonably be expected to succeed life if he is denied the opportunity of an education. *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

A school suspension, even of short duration, has the potential of seriously jeopardizing this opportunity.

It is notable that virtually all of the major national educational associations endorse the concept of fundamental protection for the disciplined student. The National Education Association has resolved that:

> Procedures may vary in formality with the gravity of the offenses or of the sanction to which an accused person is liable. In no case may the student's rights be abridged or denied, and in no case may the same person act as both judge and prosecutor.[49]

The Joint Statement on Rights and Freedoms of Students[50] notes that while "practices in disciplinary cases may vary in formality with the gravity of the offense and the sanctions which may be applied," nevertheless,

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form of the hearing, we would suggest that once school officials have been given the latitude to address the "extraordinary situation" i.e., emergency, no reason exists in fact to deny a student, not within the ambit of the extraordinary situation, the benefit of real, meaningful procedural safeguards. Moreover, as the lower court noted, the student summarily suspended pursuant to an extraordinary situation should promptly be given a subsequent hearing.

[49] NEA Resolution 60-12, Published in the "Code of Student Rights and Responsibilities," NEA, Washington, D.C., 1971 at p. 29.

[50] Subscribed to by the Association of American Colleges, the American Association of University Professors, the National Student Association, the National Association of Student Personnel Administrators, the National Association of Women Deans and Counselors, and the American Association of Higher Education.

In all situations procedural fair play requires that the student be informed of the nature of the charges against him, that he be given a fair opportunity to refute them, that the institution not be arbitrary in its action and there be a provision for appeal of the decision.[51]

The American Association of School Administrators recently resolved that suspensions and expulsions should not be utilized unless the "health and safety of other students or personnel in all schools is jeopardized."[52]

In sum, this Court's precedents and good sense require that procedural protections precede exclusion from school. Such protection is minimally necessary to prevent the arbitrary, mistaken or capricious deprivation of the all-important right to education. Affirmance of the District Court's decision would achieve this goal.

Respectfully submitted,

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[51] Found in 53 American Assn. of University Professors Bulletin 365, 368 (1967).

[52] Vol. 7, No. 40 Education Daily at p. 5 (Feb. 27, 1974).

V.

Punishments and Behavior Control Techniques

V. Punishments and Behavior Control Techniques

Once a school district has properly identified an occasion requiring disciplinary action and has followed the requirements of procedural due process, it must decide upon and carry out a sanction. It should go without saying that the punishment should fit the crime -- that is, it should be reasonable, not excessive, and, hopefully, of some educational value. Most frequently school districts use detention, suspensions and expulsions as punishments. These are clearly accepted as appropriate by the courts and almost everyone examining school practices.

Yet even these punishments -- while legally valid -- may be inappropriate as a rehabilitation device, or at least lacking in imagination. An article by Merle McClung Alternatives to Disciplinary Exclusion from School, 22 INEQUALITY IN EDUCATION 58 (July, 1975) suggests more imaginative and educational punishments, where punishment is appropriate. It is reprinted here as Part V(A).

Finally, it should be noted that even the traditional forms of punishment -- suspensions and expulsions -- may nonetheless be legally invalid if excessive compared to the wrong committed. A student should not be expelled for tardiness, he should be detained after school. A student should not be suspended for purposefully littering school grounds, she should be required to do clean-up duty for a week. A student disturbing a class by talking loudly during a study period should not be beaten, he or she should be told to leave the class for a temporary period of time. Only serious infractions should require serious punishments, after full procedural due process has been accorded. Cases where courts have found sanctions excessive are discussed in Part V(B).

Part V(C) discusses legal theories and cases which focus on a form of punishment which we feel should never be permitted -- corporal punishment. As will be seen, however, some courts disagree. Appendices contain (1) a table of current cases, (2) a bibliography on educational and psychological aspects of corporal punishment, and (3) a discussion of procedural due process requirements.

Part V(D) discusses other punishments which we consider legally unacceptable (grade reduction and loss of financial aid).

Finally, Part V(E) discusses the most sinister sanction of all -- the administration of behavior modifying drugs, and the use of other psychological tools. This practice is sinister in that school authorities pursuing it do not even admit that it is a sanction for misconduct. Yet it usually occurs in a context where teachers or other school authorities feel that they have a "behavior problem" which they cannot handle.

V(A)

Alternatives to Disciplinary Exclusion from School

by Merle McClung

The Supreme Court's decision in *Goss* v. *Lopez*[1] should encourage many schools to reevaluate their policies and practices about suspending students from school, and hopefully will stimulate greater efforts to develop educational alternatives to exclusion which help to remedy the underlying problem. Although it is almost a truism to say that excluding a student from school is usually a way of ignoring the problem rather than dealing with it, exclusion is one of the most common public school responses to problem behavior. And exclusion is by no means limited to short-term suspension of high school students as was the case in *Goss* v. *Lopez*. The response to misbehavior is often expulsion from school (i.e., long-term, often permanent, exclusion), and elementary school children are sometimes involved.

This article will outline some alternatives to disciplinary exclusion from school which need not interfere with the educational rights of other students, and will discuss some problems involved in developing alternative programs. Programs involving isolation in plywood booths, behavior modifying drugs and corporal punishment will be discussed before outlining some preferable alternatives and criteria by which they can be evaluated. Since many alternatives to exclusion include various behavior modification techniques, problems they raise will be considered separately, along with the possibility that the school rather than the student should be the object of change. Finally, an approach to disciplinary problems will be suggested which would incorporate the development of alternatives to exclusion as well as the due process required by *Goss* v. *Lopez*.

Eight-by-Ten Foot Plywood Booths

Alternatives which are developed without sensitivity to a student's individual needs may do more harm than the exclusionary practices they replace. *The Hartford Times* reports that one Connecticut school has initiated a new program called "In-School Suspension":

> Rather than spend the days of suspension in academic limbo, students here are instead isolated from their classmates by being placed in booths in the behavior modification lab. There, academic-oriented time is alternated with recreational periods every 15 minutes in another room. . .In the two months that the project has been underway. . .the counselors report a reduction in recurring problems.
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> A student, said [the principal] can be placed in the booth for any infraction of school rules, from smoking on school grounds to fighting or cutting classes. Prior to any decision to suspend, a conference is held with the child's parents.
>
> While in the booth, the student is usually given assignments, either by his teacher or a counselor-psychologist. "The student has an educational day that is structured," said. . .a counselor. "If he needs help in English or math, we can hook him up with a tutor."
>
> If the reason for a child's unwarranted behavior is not easy to determine, the counselors ask him to write down what happened and follow that

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Merle McClung is currently working half time as a staff attorney at the Center for Law and Education and half time as a legal consultant for the Connecticut Commissioner of Education.

> up with a discussion of the problem.
>
> "Some students are trying to gain a kind of acceptance by a teacher or by other students by misbehaving in class," [the counselor] said. "If we were to keep him in class, we would be rewarding his negative behavior. Other kids are angry when they get here because they feel they did not do anything wrong."
>
> While the plywood booths are soundproof and only 10 by 8 feet in size, [the counselor] said their purpose is not "isolation for the sake of isolation. The kids need a break every 15 minutes because the booths have no stimulation. It would not be humane to keep anybody in there all day."[2]

While there appear to be some positive aspects to the program as described, many parents would feel that confinement in an eight-by-ten foot plywood booth for even short periods of time is psychologically damaging and much more harmful than suspension from school. And many psychologists would agree. Other questionable programs which may be more harmful than exclusion from school include the use of behavior modifying drugs and corporal punishment.

Behavior Modifying Drugs

Some schools effectively condition a student's continued attendance in a regular or special class upon parental consent to the use of behavior-modifying drugs on the student.[3] At one time tranquilizers were often prescribed to calm hyperkinetic children, but now stimulant drugs are in vogue because some studies have found that amphetamines and other stimulant drugs paradoxically increase attention span.[4] Although there are very few follow-up studies of the side effects of these drugs, some uses of stimulant drugs on some children under a physician's supervision appear justified.[5] But very few "troublesome" children are truly hyperkinetic, and stimulant drugs are being used on children who are mislabeled as hyperkinetic,[6] or are tagged with catch-all labels like "minimal brain dysfunction" (or "functional behavior disorder") which include a wide variety of "symptoms", many of which are common to almost all grade school children.[7]

Prescribing amphetamines or other drugs in an attempt to modify behavior represents a considerable medical intervention, and may not be the least restrictive intervention even for those children who are truly hyperkinetic. In June of 1973, a California medical researcher, Dr. Ben Feingold, reported to the American Medical Association his initial findings that artificial colors and flavors in foods and beverages may contribute to hyperactivity. Dr. Feingold claims to have successfully treated more than fifty children with hyperkinesis by prescribing a special diet free of the artificial additives found in convenience foods and soft drink powders.[8] Not only is prescription of a special diet a less restrictive intervention than behavior modifying drugs, but it also has the obvious advantage of addressing the cause rather than symptoms of the problem for those children whose hyperactivity is due to artificial additives in food. The National Institute of Education has funded further independent research of Dr. Feingold's findings.

The potential for misuse of drugs to control school children who exhibit non-conforming behavior has led to some proposals to prohibit their use.[9] A somewhat different approach has been adopted in Massachusetts where legislation[10] prohibits the administration of any psychotropic drug listed by the department of public health unless the school has obtained certification from the commissioner of public health or designee that the administration of such drugs in school is a legitimate medical need of the student, and then limits administration of approved medication to a registered nurse or a licensed physician. The act also prohibits administration of psychotropic drugs to students for the purposes of clinical research.[11]

Corporal Punishment

Even if corporal punishment were effective in modifying behavior, it is a form of violence which is antithetical to the educational process and to the human dignity of both students and educators. Moreover, there is a consensus among those who have studied the issue that corporal punishment is neither necessary nor effective.[12]

Piaget's research on the development of reasoning processes in children suggests that before a certain point in development children are not able to fully understand why they are being punished. This, in fact, accords with findings that younger children react to physical punishment with confusion and interpret it as a personal rejection, while older children, even when believing they have transgressed, tend to view physical punishment as an unjust intrusion and so respond with feelings of humiliation and hostility.[13] In either case, the result is a defensiveness which frustrates rather than facilitates education.

The Council of Representatives of the American Psychological Association recently voted to oppose the use of corporal punishment in schools, juvenile facilities, child care nurseries and all other child care institutions, stating: "The use of corporal punishment by adults having authority over children is likely to train the children to use physical violence to control behavior rather than rational persuasion, education, and intelligent forms of both positive and negative reinforcement."[14] Put more simply by the National Education Association's (NEA) Task Force on Corporal Punishment: "Physical punishment teaches, in short, that might makes right: school authorities can hit a student (and claim the right to hit him) because the student has hit someone (and is told he is wrong in doing so)."[15]

Far too many students have already been taught, either at school or elsewhere, that might makes right. A Senate subcommittee recently released a preliminary report showing approximately 70,000 serious physical assaults on teachers each year, literally hundreds of thousands of assaults on students including more than 100 students murdered in 1973 in only the 757 school districts surveyed, and confiscation of 250 weapons in one urban school district in one year.[16] More intelligent methods for dealing with violence in schools need to be developed, and they of course do not preclude the use of physical restraint of students by teachers and other school officials to protect themselves and others from physical injury. Reasonable physical restraint is authorized in the following model law proposed by the NEA Task Force on Corporal Punishment:

> No person employed or engaged by any educational system within this state, whether public or private, shall inflict or cause to be inflicted corporal punishment or bodily pain upon a pupil attending any school or institution within such education system; provided, however, that any such person may, within the scope of his employment, use and apply such amounts of physical restraint as may be reasonable and necessary (1) to protect himself, the pupil or others from physical injury; (2) to obtain possession of a weapon or other dangerous object upon the person or within the control of a pupil; (3) to protect property from serious harm; and such physical restraint shall not be construed to constitute corporal punishment or bodily pain within the meaning and intendment of this section.[17]

Some states[18] and many cities[19] have already adopted similar policies prohibiting corporal punishment without precluding reasonable physical restraint to prevent injury.

PREFERABLE ALTERNATIVES

Having discussed some questionable alternatives to suspension, we are left with the more difficult question of what are some good alternatives? The recommendations of the NEA Task Force on Corporal Punishment, reproduced on the accompanying pages (see box), outline a number of short, intermediate, and long range solutions. While this listing is useful in providing a basic framework for consideration, it does not set forth the kind of specifics necessary to design programs, and some educators will want to consult other literature.[20] As with other "model" programs, however, alternatives to exclusion will probably be difficult to transplant because of local differences. The structure of successful programs is usually less important than the unique character and spirit of the persons involved in them. Thus, while knowledge of the specifics of successful programs can be useful, an effective program developer will probably want to give more attention to adapting the proposed alternative(s) to the strengths and weaknesses of his/her staff and to other aspects of the local situation. In addition to the NEA listing, he/she may be interested in the following approaches.

Some schools report success with "rap sessions" with small groups of students; peer counseling (described by one ten year old as "helping someone else to give advice to themselves"); behavior contracts (a mutually negotiated agreement between a student and an instructor to reach prescribed behavior/educational goals); advocacy programs (each student selects one teacher or administrator to act as an advisor and mediator in the event that he/she has problems); and alternative educational experiences for students who are bored or turned-off by regular classes.

These and other approaches are discussed in "Alternatives to Suspension", a handbook[21] published by the South Carolina Community Relations Program of the American Friends Service Committee (AFSC) "to dispel the myth that there are no alternatives to out-of-school suspension." Not being sure that they approve of all the alternatives discussed in the handbook, the authors stress that much depends upon how they are adapted and implemented by those in authority.

The Least Restrictive Alternative

The alternative techniques which are discussed below—reasoning with the student, "cooling-off" rooms, special intervention within a regular class, and special intervention in separate programs—represent points on a continuum ranging from negligible to considerable intervention in the normal life of the individual. Development of the least restrictive alternative should be a guiding principle. Integrating children with special needs (including children with behavior disorders[22]) into regular classes as much as possible ("mainstreaming") and into an environment as normal as possible ("normalization") reflect growing education and treatment trends.[23] In some situations there is even a legal basis for asserting a right to a less restrictive alternative.[24]

Reasoning with the Student

In a recent article,[25] William Glasser offers suggestions for teachers dealing with disruptive children, the first seven of which do not necessitate removal from class. These include suggestions for how to reason with misbehaving students. Some persons will consider it futile to reason with disruptive students, but this approach is often discarded too quickly. One principal contends that strict authoritarianism by school administrators no longer works, and more time and effort should be devoted to reason and discussion. She asks three questions as a matter of course: What did you do? Why did you do it? What do you think should be the consequences?[26]

"Cooling-Off" Rooms

Many schools report successful implementation of "cooling off" or "time-out" rooms. Mr. Glasser suggests a non-punitive atmosphere, with perhaps a comfortable couch, and books and magazines around the room.[27] As the name indicates, this is a place where the student can go to cool off or take some time out—an alternative to the regular classroom for the rest of the period or however long it takes to unwind. Such rooms differ from the isolation booths mentioned above in being less confining and generally having a less punitive quality. Usually the teacher decides when the student needs this kind of in-school suspension. One school in Iowa has worked out an interesting variation for a frequently disruptive thirteen year old boy; the principal, teachers, parents and the boy have agreed that whenever the boy feels he is losing control for whatever reason, he is free to leave the class and spend the rest of the period in the cooling-off room.

Special Intervention With Regular Class

For some situations, in-school suspension utilizing a cooling-off room will be sufficient, but many disruptive students will need more than a room in which to sit by themselves. Their aggression, hostility, apathy or other symptoms of problems may necessitate some kind of special professional intervention. Where a student's behavior is determined to be serious enough to justify this kind of intervention, removal from regular classes is not always necessary. In fact, it is usually educationally preferable to enroll students in regular classes and provide help on an individual or small group basis.

Dr. Samuel Kirk notes that if the regular classroom teacher cannot handle the problem without help, there are at least two other regular class alternatives: (1) psychologists, social workers, counselors, principals and others help the teacher better understand the child's needs, but major treatment responsibility remains with the classroom teacher; and (2) itinerant teachers such as speech clinicians, remedial reading teachers, and child therapists come into the classroom to assist the child in adapting to the regular class. If assisting the child in the regular classroom disrupts the educational process for other children, a resource room to which the child is assigned for part of the day for special help may be advisable.

In their study showing significant academic gains and behavioral changes for behavior problem children in a part-time resource room supplementing their regular second through sixth grade classes, Glavin, Quay, Annesley and Werry outline some of the reasons (in addition to lower cost) for preferring this kind of approach over full-time separate classes:

> It has been observed for some time that many children who are referred for disruptive and other deviant behavior are problems in the regular class for only a part of the school day (Kounin, Friesen & Norton, 1966; Long, Morse & Newman, 1965). These disruptive episodes may, in fact, be related to the child's academic difficulties. It should also be noted that behavior problems in a significant number of children do not persist over time even in the absence of formal intervention (Glavin, 1968; Shephard, Oppenheim, & Mitchell, 1966). Both of these factors make questionable the need for full-time placement outside the regular class with the concomitant labeling and extrusion phenomena.[28]

Another study reported by Glavin supports earlier studies which show "spontaneous improvement" of approximately 70 percent of children initially screened as behavior problems. Glavin states that these results should not lead schools to a non-intervention policy, but rather to play a prominent role, especially since some of the studies indicate that a major reason for spontaneous improvement was the child's progress in academic and other school tasks. Glavin's study suggests that most children identified as behavior problems do not need to be removed from regular classrooms.[29]

Special Intervention: Separate Programs

The behavior of some students is, of course, so disruptive and extreme that full-time separation from regular classes is necessary. But rather than providing a basis for ignoring the problem through exclusion, behavior which is found to be so extreme as to justify full-time exclusion from regular class[30] should trigger special efforts by the school to find an appropriate educational alternative. Some students will need some highly individualized help, perhaps in a hospital or residential setting. Others will be able to benefit from separate classes. There are a number of educational strategies which might be used in separate programs with students with behavior disorders. Dr. Samuel Kirk identifies six educational strategies: (1) psychodynamic, (2) behavior modification, (3) developmental, (4) learning disability, (5) psychoeducational, and (6) ecological.[31]

The major emphasis in the *psychodynamic* approach is on treatment through psychotherapy with educational aspects as secondary. The focus of the treatment is to remove the "underlying causes" for the behavior, usually thought to originate in traumatic childhood events which are subsequently repressed. Dr. Kirk notes, however, that "because of the length of treatment, the questionable success of psychotherapy (especially in children), the expense involved, and the lack of trained personnel to implement the model, its widespread use is seldom found outside psychiatric hospitals and psychiatric residence centers."[32]

Proponents of *behavior modification* admit that complex historical events determine behavior, but they emphasize changing the child's response to his present environment rather than reconstructing the past in order to effect changes in behavior. Behavior modification programs are discussed more fully below.

The *developmental* approach stresses attention to a sequence of educational goals, each of which must be mastered before the student is ready to deal with the next. The sequence of educational tasks developed by F.W. Hewett can be summarized as follows: (1) attention, (2) response, (3) order, (4) exploratory, (5) social, (6) mastery, and (7) achievement. Hewett has implemented his approach in an "engineered classroom" divided into three work sections ("mastery", "order" and "exploratory" centers) corresponding to levels on the developmental hierarchy. The

Photo by Deborah Feingold

"engineered classroom", according to Hewett, is basically a launching technique for children who fail to "get off the ground" in school, and probably should be limited to one semester.[33]

Psychoeducational strategy involves an equally balanced educational and psychiatric program. The goal of intervention by the teacher-therapist team, as described by Kirk, is to interrupt a cycle started when the child does not possess certain social and readiness skills, cannot meet externally imposed demands, resulting in internal anxiety and frustration, leading in turn to maladaptive behavior which will be aggravated unless the essential coping skills are learned.

The *ecological* approach rejects psychotherapy and behavior modification because they concentrate on changing or adjusting the child to fit the environment, rather than focusing on the need to change the child's environment as well. Thus an ecological program might also try to modify the attitudes of the home, the school, and the community in the belief that they join with the child to form a small social system ("an ecological unit") constituting the problem. The possibility that the school environment might need to be changed as much as the child is discussed below in a separate section.

Although it is often difficult to determine whether a behavior problem causes poor academic performance or poor academic performance causes the behavior problem, they certainly reinforce each other. Effective compensatory work on the so-called *learning disability* (reading, writing, spelling, etc.) tends to improve conduct as well by closing the gap between the student's capacity to perform and the requirements of society.

Sometimes both poor academic performance and behavior problems are caused by perceptual, auditory or other *specific learning disabilities,* and direct intervention to remedy the handicap will also have a positive effect upon the student's behavior. As is the case with other handicaps, an effective educational program is unlikely to be designed without an accurate diagnosis of the underlying problem, and failure to identify the problem can result in misclassification of a student as mentally retarded or emotionally disturbed.[34]

A number of recent federal court decisions[35] have held that exclusion from education because of handicap is unconstitutional. Behavior which is serious enough to justify expulsion from school may constitute a handicap within the meaning of these decisions, and/or make the student eligible for special education under state statutes.[36] In such cases, alternative programs would be a legal obligation rather than simply good educational policy.

Criteria to Evaluate Alternatives

The authors of the "Alternatives to Suspension" handbook mentioned above suggest applying the following criteria in judging any program or technique which is supposed to provide an alternative to exclusion from school.

1. Is there real evidence over a period of time that the number of suspensions are actually reduced by the use of the alternative program or technique?

2. Does the alternative program or technique truly help to meet the needs of the students who would have been suspended? Does it help solve the problem that led to the disciplinary action?

3. Is the student making genuine academic progress at a level which is appropriate for him/her if participating in an alternative program?

4. As a result of the use of the alternative program or technique does the student begin to develop greater self-discipline?

A fifth criterion (perhaps only a clarification of the second) should be added; namely, does the alternative infringe upon the student's dignity, privacy, free expression or other civil liberties? This question is raised because some of the most effective alternatives to exclusion incorporate behavior modification techniques which may raise serious legal, social and educational questions. While greater experience is necessary to draw general conclusions about the desirability of behavior modification programs, the following section discusses some programs reported as successful, and identifies some problem areas which should be considered in any determination of whether to develop, refine, or discontinue a particular program.

Behavior Modification Programs

Behavior modification programs seek to change behavior by arranging the events in a learner's environment so that he/she responds in a desirable and predictable direction. Behavior is modified by offering rewards for acceptable behavior (often taking the form of a token economy) and by withholding rewards for unacceptable behavior (or in some cases, punishment[37]). Many educators have reported success with various behavior modification programs.

Bright and Vincent report successful results with behavior modification techniques in the Juvenile Achievement Center School in Waco, Texas.[38] This individualized program was provided to students between the ages of 11 and 15 who tested at least two years below grade level and exhibited socially maladaptive behaviors that would prevent them from succeeding in the regular school program. Staff members use a micro-economy as an incentive system to positively reinforce student academic performance and social behavior. Positive academic and social behaviors earn students points which can be converted into money for purchasing reinforcers (such as craft materials or a game of pool) in a student-operated store. Students are not allowed to remain in the program beyond three semesters, and a report by counselors in the sending school districts indicated that the students functioned adequately upon returning to the public school environment, with over half of these students showing few, if any, maladaptive behaviors.

Positive academic and behavioral gains using behavior modification techniques are also reported by Glavin, Quay, Annesley and Werry.[39] The Temple University Resource Room Project incorporated a token economy as a reinforcement system for elementary school children referred by teachers who considered them extremely disruptive or overly withdrawn. Two of the three referring schools were in low socio-economic, majority black areas. A resource room supplementing regular classes was developed as an alternative to special class placement. Children in the experimental group were scheduled for a resource room program during those periods of the day in which they were functioning least effectively in the regular class. Since behaviorally deviant children usually have academic deficiencies either as the cause or the effect of deviant behavior, the reinforcement program emphasized academic remediation in a structured classroom situation. The experimental group made significantly greater gains in reading vocabulary and arithmetic fundamentals than did a comparison group. As to behavioral changes, Glavin *et al.*, conclude that "while the children's behavior can be changed rapidly and dramatically in the resource room situation, generalization into the regular classroom does not occur automatically, but requires deliberate attempts to generalize this improvement into the regular classroom."[40]

An interesting variation of these programs has been developed by Graubard and Rosenberg.[41] They teach *students* how to change *teacher* behavior by using behavior modification techniques. Seven children, one black, two white and three Mexican-American, aged 12 to 15, who were in a class for children considered incorrigible were given instruction and practice in behavior modification. They were taught various reinforcements to use in shaping their teachers' behavior. They learned to reward positive teacher behavior with smiling, making eye contact and sitting up straight; and to discourage negative teacher behavior with statements like, "It's hard for me to do good work when you're cross with me." Graubard and Rosenberg found that the teachers responded much more positively towards the students, many of them feeling that the engineering by the students created a more positive working environment by eliminating cutting and sarcasm.

Rosenberg contends that students can also use these techniques to resolve problems with their classmates:

> We can teach kids systematically how to make friends, how to get along with other students . . . If they're being teased, we can teach them how to extinguish that permanently. If they're getting in fights, we can teach them to use basic learning principles to get the same thing they were trying to get by fighting.[42]

He describes their approach as follows:

> The revolutionary thing here is that we are putting behavior-modification techniques in the hands of the learner. In the past, behavior modification has been controlled more-or-less by the Establishment. It has been demanded that the children must change to meet the goodness-of-fit of the dominant culture. We almost reverse this, putting the kid in control of those around him.[43]

The reversal is not complete as their approach does in fact change the behavior of the students; the outcome is not necessarily cynical, as one might expect, because Graubard and Rosenberg stress learning to praise teachers with sincerity. "They had to *sincerely* mean it so it would be accepted by the teacher as an honest statement of a kid's feelings, not as smarting off."[44] Thus the teachers who remained convinced that the projects had changed the students rather than themselves were at least partly correct.

While many educators report success with various behavior modification programs, others point out problems. They say that behavior modification makes discipline a system of rewards rather than progress toward mutually established and worthwhile goals; that it undermines internal control by emphasizing external rewards; that it encourages mercenary rather than reasoning individuals by substituting pay-offs for reason; that it encourages students to "act" as if they were learning in order to obtain rewards; that it emphasizes short-range rather than long-range effects. These and other criticisms of behavior modification programs are outlined by Lindsey and Cunningham.[45]

The goals of behavior modification programs deserve as much scrutiny as their methods. All behavior modification programs attempt to change behavior towards a norm—a norm which many persons may legitimately refuse to accept. This raises the question of whether it is always the student who needs to be changed.

The School Versus the Student as the Problem

Any reexamination of suspension policy and in-school alternatives should begin with some honest questioning about whether the school environment is more a cause of the problem than the student. As is implied by some of the NEA's suggested solutions, in some situations the educational environment rather than the child should be changed. Many educators believe that schools can tolerate much more disorder than they think they can; in fact the strict control characteristic of most public schools often not only fails to serve an educational purpose but in fact does the opposite. Thus the late Edward Ladd argued that it is counter-educational for schools to impose on the lives of their students a degree of orderliness ("prescribed curricula, assignments, minute-to-minute schedules and the hundreds of 'do's' and 'don'ts' confronting students at all levels"[46]) which is enormously greater than the orderliness found in the real world outside school walls.[47]

Quite apart from the educational validity of rigid, controlled educational environments, one report emphasizes how they can cause misbehavior or emotional disturbance in "normal" children.

> For the so-called "normal" children, a certain amount and type of misbehavior is expected. If, as educators and psychologists tell us, much of the misbehavior is due to an educational system that dulls rather than excites children's minds, then only a restructuring of the educational process will solve this problem. . . [I]t is important to recognize that "normal" children may develop hostile and aggressive behavior patterns if school authorities respond to them too severely or inadequately. In fact, such responses may cause the "normal" child, over a period of time, to become emotionally disturbed.[48]

Many normal students react adversely to what they consider the pointless exercise of authority within the school, treating them as subjects, rather than persons. To say this is not to deny the need for authority or learning how to question it in a constructive manner. As Ladd said, "to be sure, part of education is learning to take orders, but this learning can take place best if the obedience is to orders reflecting the limits and requirements of real life and not to orders especially created for teaching obedience."[49]

Teachers of course are a crucial part of this school environment. A study[50] by Rubin and Balow suggests that teachers are oriented to a range of expected pupil behaviors much narrower than typical behavior patterns of normal young boys. Noting the rigidity of the traditional medical-categorical system of identifying handicapped children, the authors define educational handicap in practical behavioral terms as the inability to adequately meet the demands of the educational systems. Using this definition, they asked teachers to identify a sample of boys and girls in grades K-3 with learning and behavior problems requiring special educational services. The teachers identified 41.1 percent of the children in one or more problem categories,[51] with special placements or special services having been instituted for 24.3 percent of study subjects. Even with the expanded definition of educational handicap, the percentage of identified children is surprisingly high because all subjects had been tested prior to school entrance and were essentially normal on socioeconomic, medical, intellectual, and school readiness characteristics. The results lead Rubin and Balow to the following conclusions:

> The findings suggest that schools and teachers are oriented to a narrow band of expected pupil behaviors which are not consonant with typical behavior patterns of young boys; any pupil outside of that narrow range is treated as needing special attention. . . The large proportion of children identified by teachers as needing special educational services raises serious questions about the ability of our educational system, as presently organized and conducted, to adequately accommodate the broad range of individual differences found within the typical school population. Clearly these data suggest a need for diagnostic and remedial procedures directed toward school systems at least equivalent to those directed towards school children.[52]

While there is evidence that teachers can reliably and validly report overt, discrete aspects of student behavior,[53] some studies have reported that the behaviors of students that disturb teachers most are those that are different from their own beliefs. One study[54] by Kay & Lowe lends support to the conclusion of several authors that teachers resent most behavior which interferes with *their* programs, *their* ideals, and *their* beliefs.[55] Noting these studies, a report by the Council for Children with Behavior Disorders (CCBD) concludes that "behavioral deviancy appears to be in large part a reflection of the attitudes of the faculty rather than the behavioral criteria related to the education or safety of children."[56]

Since attitudes are so important, in-service training for teachers and other school staff in how to respond to disruptive behavior in a productive way might well supplement development of alternative programs. The alternatives listed by the NEA (see box on p. 61) include a number of suggestions which are directed toward creating a school environment which will produce fewer disciplinary problems.

Safeguards: Due Process and Consent

This article has noted that some alternative programs may entail unacceptable behavior control, and that individual liberties may be infringed by programs designed to bring behavior into conformity with a preconceived norm. Where these programs take the form of separate classes, their very existence may make schools and teachers more willing to give up on a student within the regular class framework. Some persons would argue against developing alternative programs for these reasons. Given the need to address many of the problems underlying disruptive behavior, however, a better approach would be to develop safeguards to minimize the dangers.

Central to any alternative program should be due process determinations, and a parental/student option for exclusion rather than the proposed alternative. At least as much due process should be provided prior to "in-school suspension" as for traditional suspension in order to avoid incorrect or arbitrary determinations of misconduct. Some of the students who were placed in the small plywood booths mentioned at the outset of this article, for example, may have been right in feeling that they did not do anything wrong. And certainly, any alternative which takes the student out of regular classes for an extended period (say, ten days or more) should be preceded by the kind of formal due process required prior to expulsion from school.

Consent of the parent, and of the student after a certain age,[57] is perhaps as important as the due process hearing itself. While a consent provision raises the usual difficulties such as whether the consent is informed and at what age the student's preference should prevail, on balance consent which can be withdrawn at any time is necessary to insure against unacceptable forms of behavior modification, schools which are perceived as juvenile prisons, etc.[58] The due process hearing should relieve the parent/student of any compulsory education requirement where they find the alternative unacceptable.[59]

Voluntary attendance may be especially important if a program for students with behavior disorders is to succeed, but the argument can be made both ways. For example, as noted above, most behavior modification programs, operating on the principle that student motivation is a prerequisite to learning, incorporate incentive systems such as a token economy. Thus it might be argued that a student should be compelled to attend so the incentive system will have a chance. But fears such as unacceptable stigmatization and behavior control outweigh this consideration. At least until there is some experience showing that the educational alternatives are desirable and would continue to be so even on an involuntary basis, the parent/student should be given the ultimate responsibility for deciding whether or not to take advantage of the alternative. This principle is incorporated in the suggested approach to disciplinary problems set forth in the next section.

Suggested Approach to Disciplinary Problems

1. When a student is charged with disruptive behavior which the teacher cannot handle informally, the teacher informs the principal or other designated person with expertise in disciplinary problems.

2. The principal or designee informs the student of the charge and, if denied, permits the student to tell his/her side of the story. This is not meant to be an informal hearing, just a chance for the principal or designee to learn more about the situation and decide how to proceed.

3. If the principal or designee[60] determines a need to remove the student from the regular class, he/she sends the student to a "cooling-off" room for the remainder of the period. The "cooling-off" room should have a non-punitive atmosphere, and be appropriately supervised, perhaps by the designee, if more than one student is using it.

4. The principal or designee arranges a time and place to get the teacher and student together to discuss the problem and attempt to work out an informal solution.

5. If in the judgment of the principal or designee, the preceding steps are insufficient to resolve the matter and exclusion or some kind of alternative may be advisable, he/she notifies the parent or guardian.

6. For reasons discussed in the preceding section, the notice to the parent or guardian reads as follows: Your son/daughter [name] has been charged with disruptive behavior by [person making charge] today, [date]. The disruptive behavior involved [fighting with John Doe in English class]. We sent [name] to our cooling-off room for the remainder of the period. I am recommending development of an alternative to suspension for [name] to help deal with this problem, or a suspension for [five days]. We will have an informal hearing on [date and time] at [place] to determine the validity of the charge and appropriate disposition of this matter, and would appreciate your attendance. At this hearing the person making the charge will be present, your son/daughter will have an opportunity to tell his/her side of the story, [specify other procedures[61] to be followed at the informal hearing]. According to school board policy, if [name] is found guilty of disruptive behavior, we will suggest an alternative to the suspension period. If for any reason you think that suspension is preferable to the alternative, you can choose suspension.

7. To the extent practical, the principal and other school personnel work with the parent and student to develop a mutually acceptable alternative to exclusion.

This approach is designed primarily with suspendible offenses in mind. If the principal is recommending expulsion, more elaborate procedural safeguards will be necessary.[62] In such cases, separate meetings for a due process hearing and for development of an alternative will probably be necessary, and both may require a comprehensive evaluation[63] of the student. The same general approach—giving the parent the choice of an educational alternative to exclusion if there is a due process determination of excludable conduct—is applicable to and recommended for serious disciplinary cases which might result in expulsion. In fact, one state has recently enacted legislation requiring this kind of approach for all its public elementary and secondary schools.[64]

This approach to disciplinary problems will not work without good faith efforts by the school. School officials could suggest alternatives which are obviously more harmful than exclusion, or the teacher(s) could easily subvert a well-designed alternative in order to pressure the student into "dropping out" or the parent into exercising the exclusion option. And of course the student or parents could complicate an already difficult task. Schools obviously will not be able to count on the full cooperation of many of these students. And parents will sometimes refuse to cooperate.[65] But even when the parental response is totally unreasonable, denying further education to the student because of the parent's actions violates fundamental principles about not punishing one individual for another's misconduct.[66]

Conclusion

Some educators have criticized the Supreme Court's decision in *Goss* v. *Lopez* as another judicial decision diverting to disciplinary matters the time and effort which should be concentrated on the educational process. Most educators, however, would probably agree with the Supreme Court's observation two decades ago that one of the purposes of public education is to help the student adjust normally to his environment.[67] Schools avoid their responsibility to educate when they exclude students who do not adjust naturally to their environment. Helping such students adjust is part of the education schools must provide. And in so doing they must be sensitive to the individual liberties involved, which includes a recognition that the object of adjustment might be the school environment as well as the student. This article has outlined a number of alternatives to exclusion which need not interfere with the rights of other students to an education. Some of the alternatives will cost more in time, effort, and other resources, but the long-term social cost will be much higher if we do not educate students because they have behavior problems.

FOOTNOTES

[1] 95 S.Ct. 728 (1975).

[2] Reported by Jill Landes in *The Hartford Times*, November 21, 1974.

[3] "This procedure is needed, the psychologist says, if the child is to stay in the regular program. In some urban areas, however, the parent is told bluntly that unless the child receives treatment (i.e., medication), he will face suspension or be transferred to a special program for the emotionally disturbed. . . . The school often refers the child to a doctor who specializes in learning disabilities and routinely uses drugs in his treatment." D. Divoky, "Toward a Nation of Sedated Children," *Learning* (March 1975) at 8, 10. See generally the special report on behavior-modifying drugs in 8 *Inequality in Education* at 1-24.

In this troubling area where the medical evidence and educational issues are so complex, and where parents are subject to unusual pressure to submit to medication, it is especially important that procedural safeguards are developed to insure that parental consent to medication for the child is informed and without duress. Also it should be obvious from *infra* notes 5-7 that only qualified doctors (preferably not school employees or referees) should label children as in need of behavior-modifying drugs.

[4] See, *e.g.*, C.K. Connors, *et al.*, Dextroamphetamine Sulfate in Children with Learning Disorders," 21 *Archives of General Psychiatry* 182-190 (1969); C.K. Connors, "Psychological Effects of Stimulant Drugs in Children with Minimal Brain Dysfunction," 49 *Pediatrics* 702-708 (1972); L. Eisenberg, "The Clinical Use of Stimulant Drugs in Children," 49 *Pediatrics* 709-15 (1972). A bibliography of such articles can be obtained from the Center for Law and Education.

[5] Compare the following:

> "The fact that these dysfunctions [hyperkinetic behavioral disturbance] range from mild to severe and have ill-understood causes and outcomes should *not* obscure the necessity for skilled and special interventions. The majority of the better known diseases—from cancer and diabetes to hypertension—similarly have unknown or multiple causes and consequence. . . . Yet useful treatment programs have been developed to alleviate these conditions." Report on "Conference on Stimulant Drugs for Disturbed School Children," 8 *Inequality in Education* 14, 15.
>
> "The Medical Letter on Drugs and Therapeutics," a conservative, non-profit publication aimed at clinicians, describes the data on the use of amphetamine-type drugs on children as "meager" and goes on to charge that "there are no adequately controlled long-term studies of the use of stimulants on noninstitutionalized hyperactive children with IQs in the normal range who have only mild neurological abnormalities. Yet it is in such children that the diagnosis of 'minimal brain dysfunction' is most often made and for whom amphetmines may be prescribed. . . ." Divoky, *supra* note 3, at 10.

[6] "So common and so misleading are these symptoms that some doctors estimate that less than half of the children labeled hyperactive by teachers and sent for special treatment are in fact hyperactive." Divoky, *supra* note 3, at 8.

The "Conference on Stimulant Drugs," *supra* note 5 at 15, states that there is no single diagnostic test and the diagnosis should be made by a specialist. "In diagnosing hyperkinetic behavioral disturbance, it is important to note that similar behavioral symptoms may be due to other illnesses or to relatively simple causes. Essentially healthy children may have difficulty maintaining attention and motor control because of a period of stress in school or at home. It is important to recognize the child whose inattention and restlessness may be caused by hunger, poor teaching, overcrowded classrooms, or lack of understanding by teachers or parents. Frustrated adults reacting to a child who does not meet their standards can exaggerate the significance of occasional inattention or restlessness. Above all, the normal ebullience of childhood should not be confused with the very special problems of the child with hyperkinetic behavioral disorders."

[7] "The most commonly used of the 38 terms applied to a grab-bag set of symptoms found in grade school children is minimal brain dysfunction (MBD) . . . hyperkinesis, the other most popular and misused label, is often used synonymously with MBD, or is described as the result of MBD." "And a new one, particularly favored by drug makers because it will cover anything: functional behavior disorder." Divoky, *supra* note 3, at 7.

"The condition commonly called minimal brain dysfunction—MBD—is not easy to diagnose: Specialists spend from six hours to three days on the diagnosis." 8 *Inequality in Education* at 8.

[8] *CNI Weekly Report* (Nov. 1, 1973) (published by Community Nutrition Institute, 1910 K. St., N.W., Washington D. C. 20006); Ben F. Feingold, *Why Your Child is Hyperactive* (1975).

[9] See, *e.g.*, The National Welfare Rights Organization's Petition of April 2, 1971 to the Food and Drug Administration "To Withdraw Approval of Methylphenidate Hydrochloride [Ritalin] For Use in Hyperkinetic Behavior Disorders in Children." Petition denied in decision of March 17, 1972.

[10] M.G.L. Chapter 71, s.54B.

[11] See generally the regulations developed by H.E.W. for the "Protection of Human Subjects" which limit the nature and methods of research funded by the Department. 39 *Federal Register* 18914 (May 30, 1974). See also the proposed supplementary regulations for children, prisoners, and the mentally infirm. 38 *Federal Register* 31738 (November 16, 1973).

The use of behavior modifying drugs raises constitutional questions since "autonomy over one's own body, without intrusion of drugs which modify behavior—*no matter how beneficial*—is a matter of ultimate personal concern." For possible substantive challenges and procedural safeguards, see Roderick Ireland and Paul Dimond, "Drugs and Hyperactivity: Process is Due," 8 *Inequality in Education* 19.

[12] See generally the studies cited in the NEA *Report of the Task Force on Corporal Punishment, infra* note 15.

[13] *Id.*

[14] *Education Daily* (March 26, 1975) at 4.

[15] *Report of the Task Force on Corporal Punishment* (a National Education Association Publication, 1972) at 17.

[16] "Our Nation's Schools—A Report Card: "A" in School Violence and Vandalism," Preliminary Report of the Subcommittee to Investigate Juvenile Delinquency, by Senator Birch Bayh, Chairman, to the Committee on the Judiciary of the United States Senate (April [illegible], 1975).

[17] *NEA Report, supra* note 15 at 29.

[18] New Jersey, Massachusetts.

[19] For example, Philadelphia, Pittsburgh, San Francisco, Providence, Chicago, New York City, Washington D.C.

[20] In addition to the publications cited in this article, see the following NEA publications: *Coping With Disruptive Behavior, Discipline in the Classroom,* and *Discipline and Learning: An Inquiry into Student-Teacher Relationships.* The NEA Order Department is located at Academic Building, Saw Mill Road, West Haven, Conn. 06516.

[21] "Alternatives to Suspension," *Your Schools* (May 1975) (published by the South Carolina Community Relations Program of the American Friends Service Committee, 401 Columbia Building, Columbia, S.C. 29201).

[22] Kirk, *infra* note 31 at 389, defines behavior disorders as "a deviation from age-appropriate behavior which significantly interferes with (1) the child's own growth and development and/or (2) the lives of others." He summarizes M.C. Reynold's pyramid of alternatives for children with behavior disorders, starting with the least restrictive alternatives for most children at the base of the pyramid and more restrictive alternatives for a few children at the top: (1) regular classroom alternatives, (2) regular class plus resource room, (3) part-time special class, (4) full time special class, (5) special day school, (6) residential school, and (7) hospital and school. *Id.* at 412-415.

[23] See, *e.g.*, H. Love, *Educating Exceptional Children in Regular Classrooms* (1972); W. Wolfensberger, *The Principal of Normalization in Human Services* (1972).

[24] The doctrine of the "less onerous" or "less-restrictive alternative" would permit inquiry as to whether the state's legitimate purposes could have been achieved by an alternative form of action that would have avoided significant injury to the individual. See *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966). See also Harold Horowitz, "Unseparate But Unequal—The Emerging Fourteenth Amendment Issue in Public School Education," 13 *U.C.L.A. L. Rev.* 1147, 1161 (1966); G. M. Struve, "The Less Restrictive Alternative Principal and Economic Due Process," 80 *Harv. L. Rev.* 1463 (1967).

For application of this principle to cases involving public education, see *PARC* v. *Pennsylvania,* 343 F. Supp. 279, 307 (E.D. Pa. 1972) (consent agreement); and *Mills* v. *District of Columbia Bd. of Educ.,* 348 F. Supp. 866, 880 (D.D.C. 1972) which provides: "Each member of the plaintiff class is to be provided with a publicly-supported educational program suited to his needs, within the context of a presumption that among the alternative programs of education, placement in *a regular public school class with appropriate ancillary services is* preferable to placement in a special class." (emphasis added)

The new Massachusetts Special Education Act gives the parents the right to decide whether their child is to be in regular or special classes. To override this choice, the school must prove in Superior Court that regular placement "would seriously endanger the health or safety of the child or substantially disrupt the program for other students." Chapter 766, Acts of 1972.

[25] William Glasser, "A New Look at Discipline," *Learning* (December 1974).

[26] Principal Christine Webb quoted in an article in *The Columbia Record* on January 5, 1975, reprinted in "Alternatives to Suspension," *supra* note 21.

[27] Glasser, *supra* note 25 at 10.

[28] J. Glavin, H. Quay, F. Annesley, and J. Werry, "An Experimental Resource Room For Behavior Problem Children," 38 *Exceptional Children* 131 (October 1971).

[29] At the very least, such studies indicate that exclusion from school should be of limited duration rather than permanent. Some state statutes limit expulsion to the end of the school year. See, *e.g.,* the Connecticut statute, *infra* note 64.

[30] A due process hearing is required for this determination. See *infra* note 62.

[31] Samuel A. Kirk, *Educating Exceptional Children* (1972) at 402. The description of these programs which follows in the text is based on Kirk's summaries, pp. 402–412.

[32] Kirk, *supra* note 31 at 403.

[33] F.M. Hewett, quoted by Kirk, *supra* note 31 at 408.

[34] Most schools have procedures whereby children suspected of having some kind of handicap can be referred to professionals for evaluation. See *infra* notes 63 and 65.

[35] See, *e.g., P.A.R.C.* and *Mills* cases, *supra* note 24.

[36] For a discussion of state and federal law requiring public schools to educate children with behavior problems, see Merle McClung, "The Problem of the Due Process Exclusion: Do Schools Have a Continuing Obligation to Educate Children With Behavior Problems?", 3 *Journal of Law and Educ.* 491 (October 1974).

[37] In the long run, punishment, unlike reinforcement, works to the disadvantage of both the punished organism and the punishing agent. B.F. Skinner, *Walden Two* (1948) at 183.

[38] R.L. Bright and J.L. Vincent, "JACS: A Behavior Modification Program That Works," *Phi Delta Kappan* (September 1973).

[39] Glavin *et al., supra* note 28 at 132.

[40] *Id.* at 137.

[41] Farnum Gray, Paul Graubard, and Harry Rosenberg, "Little Brother is Changing You," *Psychology Today* (March 1974), reprinted in *Discipline and Learning, supra* note 20 at 87–96.

[42] *Id.* at 92.

[43] *Id.* at 88.

[44] *Id.* at 90.

[45] Bryan Lindsey and James Cunningham, "Behavior Modification: Some Doubts and Dangers," *Phi Delta Kappan* (May 1973), reprinted in *Discipline and Learning, supra* note 20 at 64–66.

[46] Edward Ladd, "Allegedly Disruptive Student Behavior and the Legal Authority of School Officials," 19 *J. of Public Law* 209, 234 (1971).

[47] This is not to deny that particular circumstances may require more control in some schools and classrooms than in others. And a few students within a class may need *more* control than the majority, and thus lack of control may reinforce behavior problems in some cases.

[48] Task Force on Children Out of School, *The Way We Go To School: The Exclusion of Children in Boston* (1971) at 44.

[49] Ladd, *supra* note 46 at 234, n.81. Some educators, however, would take exception to Ladd's view that "part of education is learning to take orders," arguing that education should not necessarily treat outside realities as unchangeable absolutes.

[50] R. Rubin and B. Balow, "Learning and Behavior Disorders: A Longitudinal Study," 38 *Exceptional Children* 293 (December 1971) (a study population of 967 school children grades K–3 in Minnesota).

[51] One of the categories was titled "behavior problems only;" 19.8 percent of the boys and 13.8 percent of the girls were identified as such by the teachers. *Id.* at 298.

[52] *Id.* at 298–99.

[53] B. Phillips, "Problem Behavior in the Elementary school," 38 *Child Development* 895 (1968).

[54] B. Kay and C. Lowe, "Teacher Nomination of Children's Problems: A Rolecentric Interpretation, 70 *J. of Psych.* 121 (1968) (a study of teachers of children grades K–6 in New Hampshire).

[55] *Id.* at 122 and 127. See also C. Loutitt, *Clinical Psychology of Exceptional Children* 236 (1957). Such conflicts often reflect social-class differences between teachers and pupils. See *e.g.,* H. Becker, "Social Class Variations in the Teacher-Pupil Relationship," 25 *J. of Educ. Soc.* 451 (April 1952); R. Rist, "Student Social Class and Teacher Expectations: The Self-fulfilling Prophecy in Ghetto Education," *40 Harv. Educ. Rev. 411* (August 1970).

56 J. Regal, R. Elliott, H. Grossman, and W. Morse, "The Exclusion of Children From School: The Unknown, Unidentified, and Untreated," (a report of The Council for Children with Behavioral Disorders) at 14.

The danger of teachers and school officials overreacting to minor instances of non-conforming behavior is obviously greater when middle class white teachers identify black pupils as problems in recently desegregated public school systems. See discussion of the expert testimony in *Hawkins* v. *Coleman,* 376 F. Supp. 1330 (N.D.Tex. 1974), summarized in article by Sylvia Demarest and John F. Jordan at pp. 28–31 of this issue.

[57] There is a growing recognition that children should not be treated as simply parental appendages. See *e.g., Arnold* v. *Carpenter,* 459 F.2d 939 (7th Cir. 1972) where the court held, *inter alia,* that lack of parental consent regarding lengthy male hair was irrelevant, with the dissenting opinion expressing the traditional view. See generally the special issues on "The Rights of Children in the *Harv. Educ. Review,* November 1973 and February 1974.

For one discussion of the difficult question of when students should exercise some control over educational decisions which affect their lives, see E. Ladd, "Civil Liberties for Students—At What Age?" 3 *J. of Law and Educ.* 251 (1974).

[58] Although not often litigated, an "educational" program which is a custodial "dumping ground" or otherwise does not measure up to minimally adequate standards may be unconstitutional. See M. McClung, "Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?" 3 *J. of Law and Educ.* 153 (1974).

[59] See *infra* note 64.

[60] If it is impractical for a third party to be introduced in these early steps, the teacher might be given discretion as to when to send students to the cooling-off room. To prevent abuse, there should be a limit on the number of times a teacher can send a student to this room without triggering due process procedures. And to help resolve the problem, the teacher-student conference of Step 4 should be required each time a student is sent to the cooling-off room.

[61]. *Goss* v. *Lopez,* 95 S.Ct. 728 (1975), only sets forth the *minimum* procedures required by the Constitution. Even when a broad interpretation is given to *Goss* (see, *e.g.,* Peter Roos, *"Goss and Wood:* Due Process and Student Discipline," this issue p. 42), these procedures may be inadequate given the authority structure in most schools (see Paul Weckstein, "The Supreme Court and the Daily Life of Schools," this issue, at p.49). Rather than expanding due process requirements for short-term suspensions, however, the author believes that a substantive approach is educationally preferable; namely, minimizing the harmful effects of suspension by providing opportunity for make-up work and exams, expunging the disciplinary action from the student's record at the end of the year, and providing alternatives to exclusion as set forth in this article.

[62] While the Supreme Court did not resolve the issue in *Goss* v. *Lopez,* most courts agree that an extensive due process hearing with right to legal counsel and cross-examination is necessary prior to expulsion (long-term exclusion) from school. See, *e.g., Givens* v. *Poe,* 346 F. Supp. 202 (W.D.N.C. 1972); *Tibbs* v. *Board of Education,* 276 A.2d 165 (Super. Ct. App. Div. N.J. 1971); *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150 (5 Cir. 1961) *cert. denied,* 368 U.S. 930 (1961); In *Mills* v. *D.C. Board of Education,* 348 F. Supp. 866 (1972), Judge Waddy sets forth separate hearing procedures for disciplinary exclusion from school (882-83) and assignment to special classes (880-82).

[63] The parents and school may want a comprehensive evaluation to determine whether the proposed expulsion constitutes exclusion because of handicap, or alternatively in order to generate the information necessary to design an alternative program suited to the student's needs. The "full core evaluation" required in Massachusetts' special education law, for example, includes (1) physical, (2) psychological, (3) educational and (4) home assessments. See *infra* note 65 where parents refuse to consent to such an evaluation.

[64] On May 30, 1975, the Connecticut General Assembly passed "An Act Concerning Exclusion From School for Disciplinary Purposes," (Substitute House Bill No. 5550). The Act, *inter alia,* requires a formal due process hearing prior to expulsion, limits expulsion to the end of the school year, and provides: "Any pupil who is expelled shall be offered an alternative educational opportunity during the period of expulsion, provided any parent or guardian of such pupil who does not choose to have his child enrolled in an alternative program shall not be subject to the provisions of section 10-184 [the compulsory education law] of the general statutes."

[65] A due process hearing will not convince some parents that their child is at fault, or that he/she should be subjected to the kind of full-core evaluation mentioned in *supra* note 63. And in some cases school officials may question whether the parent is acting in the best interests of the child. One resolution of situations involving possible parent/child conflict of interest is referral to a social services agency or to an independent decision-maker. This kind of approach has been adopted in Mssachusetts even though the governing statute requires the core evaluation to go forward upon proper referral of the child, without the need for parental consent. Massachusetts State Department of Education, Policy Statement #766-75-4, issued May 19, 1975.

The law generally recognizes the need for seperate representation when the child's interests conflict with the parent's. See *Uniform Juvenile Court Act* (National Conference of Commissioners on State Laws, 1968) (Approved by American Bar Association, 1968) Sec. 26(a); *Standard Juvenile Court Act* (6th ed. 1969), Secs. 37 & 39. See also *In re Henderson,* 199 N.W. 2d 111 (1972); *Frazier* v. *Levi,* 440 S. W. 2d 393 (Tex. Civ. App. 1969); *Heryford* v. *Parker,* 396 F.2d 393, 396 (10th Cir. 1968).

[66] *Cf. St. Ann* v. *Palisi,* 495 F.2d 423 (5 Cir. 1974) where the Court found a school board regulation to violate substantive due process because it allowed school children to be suspended for their parents' misconduct.

[67] *Brown* v. *Board of Education,* 374 U.S. 483, 493 (1954).

V(B)

Excessive Punishment

Excessive punishment could be deemed ultra vires, a violation of due process, or a violation of the eighth amendment, even if the school rule was itself valid and the form of punishment specified.

The ultra vires doctrine, discussed in full at Part II, supra, states that school officials may not do that which the legislature has not authorized them to do. They must stay within the bounds of their statutory authority. Thus, in a state where the law required a flag salute in school, the court refused to permit school authorities to expel children for failure to comply, because the law provided for no specific punishment. Commonwealth v. Johnson, 309 Mass. 476, 35 N.E. 2d 801 (1941).[1] As another example of excessive punishment being ultra vires, a state court has held that school officials have no authority to withhold diplomas of students who refuse to wear caps and gowns in a graduation ceremony, although those students may be excluded from the ceremony. Valentine v. Independent Sch. Dist., 191 Ia. 1100, 183 N.W. 434 (1921).

Expulsion for an indefinite period of suspension may be regarded as ultra vires for being too harsh to bear any reasonable relationship to the misdeed. Holman v. School Trustees of Avon, 77 Mich 605, 43 N.W. 996 (1899); Wayland v. Board of Sch. Directors, 43 Wash. 441, 86 P. 642 (1906) (dicta); Cf. Minor Girl v. Clark County Juvenile Court Services, 87 Nev. 544, 490 P.2d 1248 (1971); Tavano v. Crowell, Equity No. 32699 (Mass. Super. Ct.,Aug. 31, 1973). Permanent expulsion from an honorary society and another student organization constitutes excessive punishment for violating school rules by drinking wine during school hours. Ector County Ind. Sch. Dist. v. Hopkins, 518 S.W 2d 576 (Tex. Civ. App. 1974) (dictum at 582).

Excessive punishment might also be attacked on constitutional grounds. In a non-school case, the Supreme Court reviewed punishment in the context of the eighth amendment provision, prohibiting "cruel and unusual punishment." In Weems v. United States, 217 U.S. 349 (1910), the Court struck down 12 years of hard labor and deprivation of civil rights as an excessive punishment for making a false entry into a public record. The Court was requiring that punishment for crime should be graduated and proportioned to the offense. In another case, declaring unconstitutional a federal law which authorized expatriation of persons convicted by military court martial of desertion, the Court commented:

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[1] Sometime later, of course, the U.S Supreme Court found compulsory flag salutes unconstitutional. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

> The [eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Trop v. Dulles, 356 U.S. 86, 101 (1958).

These Supreme Court cases should offer some authority to the argument that student misconduct should involve a sanction which is in proportion to the offense, or to quote Gilbert and Sullivan, so that "the punishment fits the crime."

The issue has arisen most frequently in corporal punishment cases. Where courts have permitted corporal punishment despite the eighth amendment, they have required that it be reasonable and within bounds. See *infra* at pp. 323-31. See also *Bramlet v. Wilson*, 495 F.2d 714 (8th Cir. 1974) (reversing district court dismissal of complaint:

> . . . it is sufficient that an excessive amount of physical punishment could be held to be cruel and unusual and therefore prohibited.

See also *Nelson v. Heyne*, 491 F.2d 352, 356 (7th Cir. 1974) (some corporal punishment can be excessive); *Karp v. Becken*, 477 F.2d 171 (9th Cir. 1973) (same); *Frank v. Orleans Parish Sch. Bd.*, 195 So.2d 451 (La. Ct. App. 1967) (same); *Calway v. Williamson*, 130 Conn. 575, 36 A.2d 377 (1944) (same); *cf*. *People v. Ball*, 58 Ill. 2d 36, 317 N.E.2d 54 (1974) (same; criminal charges filed).

In school exclusion cases, substantive due process grounds may be useful, where the punishment is so disproportionate as to be unreasonable and completely arbitrary. See p. 187, *supra*. Substantive due process would seem to be an appropriate ground for invalidating expulsion for smoking in the lavatory; or expulsion for a semester for smuggling beer into a football game or getting into a scuffle on the school playground. The standard in these cases is stringent and difficult to meet, for the burden is on the student to prove that the system's rule or action was unreasonable. *Caldwell v. Cannady*, 340 F.Supp. 835, 838 (N.D.Tex. 1972); *Paine v. Board of Regents*, 355 F.Supp. 199, 204 (W.D. Tex., 1972) *aff'd per curiam*, 474 F.2d 1397 (5th Cir. 1973); *Herman v. University of South Carolina*, 341 F.Supp. 226, 232 (D.S.C., 1971), *aff'd*, 457 F.2d 902 (4th Cir. 1972) (permanent suspension following sit-in "not unreasonable"); see also *DeJesus v. Penberthy*, 344 F. Supp. 70, 74 (D. Conn. 1972) (officials entitled to greater discretion on "merits" of a disciplinary matter than procedure).

Students have prevailed in four federal cases with substantive due process approaches. In *Cook v. Edwards*, 341 F.Supp. 307 (D.N.H. 1972), the court invalidated on "substantive due process" grounds the indefinite expulsion of a student who arrived at school intoxicated. The opinion balances the competing interests of the student and system. The court noted "that a public school education through high school is a basic right of all citizens," that the "indefinite expulsion may be the end of the plaintiff's scholastic career" and, based on testimony of the plaintiff, "it is probable that the plaintiff will suffer some psychological and mental harm . . . ." In contrast, the court found "no showing that Conant School will suffer any harm if the plaintiff is reinstated pending a final hearing" despite two prior suspensions and the superintendent's testimony that reinstatement would have a harmful effect on the system's efforts to combat alcohol and drug problems. The court also noted that the expulsion seemed inconsistent with a system policy. Id. at 310-11.

A similar approach was followed in In Re Anonymous, Civil No. 3624-N (M.D. Al., Mar. 21, 1972) (Clearinghouse No. 17,014) holding unconstitutional, as applied, a policy requiring the withdrawal from school of pregnant students. The court ruled that plaintiff had a "constitutional right to receive a public education" and that the system must "justify" any deprivation. The court found that plaintiff had a "credible school record," would be pregnant for only four months by the end of the term and that it would be "to her best interest" and important to her "psychological well-being" to continue in a normal program. The court rejected the purported justifications: "gossiping or kidding her" as not weighty enough; "health and safety" as involving a matter for decision by a guardian; and advancement of "good morals and the principles of good citizenship" as "retribution" and not supported by the evidence.

In Paine v. Board of Regents, the court invalidated on due process and equal protection grounds a policy requiring automatic suspension from the university system for 24 months solely on the basis of a conviction on a narcotics charge. In the case of other crimes and misconduct, exclusion was not automatic, a student being entitled to a full hearing before a panel which at one campus consisted of three faculty members and two students. At this hearing, a student could attempt to establish "mitigating circumstances" and the panel could impose a variety of sanctions.

The court identified the system's interests as protecting other students from narcotics and providing a quality education to all students. It stated the legal standard, as follows, 355 F.Supp. at 204:

> The presumption that must withstand the test of reasonableness in this case is that plaintiffs and all other students finally convicted or placed on probation for drug or narcotic offenses will influence other students to use, possess or sell drugs or narcotics unless they are suspended from the university for a period of 24 consecutive months following their convictions.

In finding this requirement not satisfied, the court emphasized that the students affected were those placed on probation, and thereby found to be "fit subjects for rehabilitation. . . [whose] freedom poses no risk to the community at large." 355 F.Supp. at 205. A student must be given an opportunity "to show that despite [conviction or probation]. . . he poses no substantial threat [to] . . . other students . . . ." Id. Focusing on the distinctive treatment of narcotics offenders, the court also found a violation of the equal protection clause in the according of " 'bedrock procedural rights to some, but not all similarly situated,' Stanley v. Illinois . . . ."

355 F.Supp. at 206. But see Caldwell v. Cannady, 340 F.Supp. 835 (N.D. Tex. 1972) (upholding Texas law permitting schools to discipline students for possessing drugs on campus). The policy did not require that possession be on school grounds or otherwise school related, and the actions of the four plaintiffs did not directly involve the school. The court reasoned as follows, 340 F.Supp. at 838:

> It is obvious to this Court that the possession, or certainly the use of drugs by students could have an adverse effect on the quality of the educational environment in a school of any level, but particularly so when children high school age or younger are involved. This Court therefore holds that the enactment of a policy which prohibits student possession of dangerous drugs, as defined by the Legislature of the State of Texas, is a reasonable exercise of the power vested in this local school board.

Paine and Caldwell, each purporting to apply a test of reasonableness, provide an interesting contrast. The former searches for a relationship as to "all . . . students" and the latter upholds a policy because it is "obvious" what "could" occur. Paine requires a very close relationship to the school program; Caldwell ignores that issue, in effect allowing school officials to add an additional punishment to that of the criminal process.

In remanding the case of an expelled student back to the defendants in Lee v. Macon County Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974), to "reconsider the appropriate penalty," a fifth circuit panel emphasized that "[w]hen a serious penalty is at stake a school board must provide a higher degree of due process than when the student is threatened only with a minor sanction," and that there can be "such disparity between the offenses and the penalty that the commands of the fourteenth amendment have not been met." Writing for the court, Judge Godbold implied that the offenses must be serious to make expulsion appropriate:

> [A] sentence of banishment from the local educational system is, insofar as the institution has power to act, the extreme penalty, the ultimate punishment. In our increasingly technological society getting at least a high school education is almost necessary for survival. Stripping a child of access to educational opportunity is a life sentence to second-rate citizenship . . . .

Id. But see Boykins v. Fairfield Bd. of Educ., 492 F.2d 697 (5th Cir. 1974) (expulsion of students who left their classrooms without authority during boycott upheld).

Finally, Lovelace v. Leechburg Area Sch. Dist., 310 F.Supp. 579 (W.D. Pa. 1970), the court held the exclusion of a student for a "barely perceptible" moustache "arbitrary," though the rule against moustaches seemed reasonable to the court.

Ector County Ind. Sch. Dist. v. Hopkins, 518 S.W.2d 576 (Tex. App. Ct. 1974) is in harmony with Cook, Paine and Anonymous. The court indicated that the trial court should consider whether the punishment "was excessive under the circumstances" after administrative remedies were exhausted. (Punishment was expulsion from honor society and pep club, in addition to one-day suspension.)

Other courts have indicated that the sanction could be unreasonable and invalid on substantive grounds, but found the facts before it showing no infirmity. In Betts v. Board of Educ. of Chicago, 466 F.2d 629, 633 (7th Cir. 1972) the court held that "due process may also contemplate affording the plaintiff an opportunity to be heard on the question of what discipline is warranted by the offense." *Cf*. *Andrews v. Knowlton*, 509 F.2d 898 (2d Cir. 1975) (finding expulsion reasonable under the circumstances); *Buttny v. Smiley*, 281 F.Supp. 280 (D. Colo. 1968). In *Buttny* the court observed that there were two questions relevant to the validity of the punishment meted out, *id*. at 289:

> Is the punishment meted out within acceptable limits, and, if it is, did the authorities act arbitrarily or capriciously?

In sum, substantive due process and, at least for corporal punishment cases, the eighth amendment should bar excessive punishment for trivial misdeeds.

Robert Pressman
Center for Law and Education
August 30, 1975

V(C)

Corporal Punishment

Corporal punishment has long been one of the most rudimentary tools in molding a child into a socially approved shape. "Foolishness is bound up in the heart of a child, but the rod of correction shall drive it from him." Proverbs 22:15. In one large western city, in 1971, corporal punishment was used to drive out such foolishness as misspelling words, entering class with shirttails out, or the failure to use the term "sir." *Dallas Morning News*, May 23, 1971.

The use of corporal punishment in schools arose in a day when wives, servants, apprentices, sailors and soldiers were also beaten as a matter of course by those with authority over them. *See e.g.*, *Puckett v. Puckett*, 204 Ala. 607 (1941) (wife); *Tinkle v. Dunivant*, 84 Tenn. 503 (1866) (servant). Teachers were assumed to have been delegated this authority to discipline by force when parents chose to send their children to that particular school or tutor. "The teacher for the time being stands to some extent at least, *in loco parentis*, has a portion of the powers of the parents delegated to him, namely, that of restraint and correction, as may be deemed necessary . . . ." Drum v. Miller, 135 N.C. 204, 47 S.E. 421, 425 (1904). *See also State v. Pendergrass*, 19 N.C. 365 (1837). With the advent of compulsory education, however, the assumption of a consensual transfer of power has lost its validity. See p.8, *supra*.

The fight against corporal punishment has been waged along several lines. The most traditional strategy has been a tort action for assault and battery in state courts. Second, parents might claim a violation of their constitutional right to rear their own children. This theory has been rejected, however, by a three judge district court which received the silent affirmation of the Supreme Court, as will be discussed below. Third, a child can claim a violation of his or her constitutional rights to either substantive or procedural due process, and to freedom from cruel and unusual punishment under the eighth amendment. These theories have enjoyed limited success in the courts, and will also be discussed below. On balance, it is quite clear that procedural due process must be followed; and that severe beatings will be deemed cruel and unusual in violation of the eight amendment. Finally, where judicial redress seems unlikely, a statutory ban becomes necessary.

ASSAULT AND BATTERY

Even before the days when families mounted constitutional challenges to corporal punishment, the overzealous punishment of a child was prohibited by common law. A teacher who too forcibly punished a child could be held civilly or criminally liable for assault and battery. The rule governing this is stated in 1 AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS 29, Sec. 13. However, a school teacher is generally held to have a privilege absolving him or her from liability. *See generally* PROSSER, LAW OF TORTS, Sec. 27 (4th Ed. 1971), but this privilege is not absolute. In early cases, the privilege extended to any discipline that was not undertaken maliciously. *See e.g.*, *Drum v. Miller*, 135 N.C. 204, 47 S.E. 421 (1904) (teacher not liable for permanently blinding student unless he foresaw or should have foreseen such a result on throwing a pencil at him). Today the courts generally hold that the privilege is limited to the contact reasonably necessary for the purpose to be accomplished. *See e.g.*, *Frank v. Orleans Parish Sch. Bd.*, 195 So.2d 451 (La. Ct. App. 1967) (physical education teacher's actions in lifting, shaking and dropping student excessive); *Calway v. Williamson*, 130 Conn. 575, 36 A.2d 377 (1944) (principal's kneeling on student's stomach excessive); *see also State v. Vanderbilt*, 116 Ind. 11, 18 N.E. 266 (1888) (reversing dismissal of charge of assault and battery where teacher used force to enforce an unreasonable rule); and *People v. Ball*, 58 Ill. 2d 36, 317 N.E. 2d 54 (1974) (upholding criminal charges for striking a student beyond reasonableness with a wooden paddle.). Reasonableness is determined by (1) the instrument used, (2) the age, size, strength and health of the child, and (3) the nature of the offense. *Suits v. Glover*, 71 So.2d 49 (Ala. 1954).

While the teacher may be held civilly liable, however, state law is divided on the question of whether a school board may be held liable under a *respondant superior* theory. Traditionally, municipal bodies such as school boards were immune from such suits. PROSSER, LAW OF TORTS, Sec. 131 (4th Ed. 1971). Many states have abrogated such immunity, including, as of 1971, Alaska, Arizona, Arkansas, California, the District of Columbia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Oregon, Utah, Washington and Wisconsin. Id. at 985 n. 50 (abrogating municipal immunity). But see *Donahue v. Richards*, 38 Me. 379 (1854); *Dritt v. Snodgrass*, 66 Mo. 286 (1877); *McCormick v. Burt*, 95 Ill. 263 (1880); *Board of Educ. of Cartersville v. Purse*, 101 Ga. 422, 28 S.E. 896 (1897); *Board of Educ. of Covington v. Booth*, 110 Ky. 807, 62 S.W. 872 (1901); *Morrison v. City of Lawrence*, 181 Mass. 127, 63 N.E. 400 (1902); *Sorrels v. Matthews*, 129 Ga. 319, 58 S.E. 819 (1907); *Douglass v. Campbell*, 89 Ark. 254, 116 S.W. 211 (1909); *Barnard v. Shelbourne*, 216 Mass. 19, 102 N.E. 1095 (1913); *Sweeney v. Young*, 82 N.H. 159, 131 A. 155 (1925) (absolute immunity for acts taken within range of general authority). See also 68 Am. Jur. 2d, Schools, Sec. 268, at 592-593 (1973); 79 C.J.S., Schools and School Districts Sec. 503 (d), at 451 (1952); PROSSER, HANDBOOK OF THE LAWOF TORTS, Sec. 132, at 989 (4th Ed. 1971); HAMILTON & REUTTER, LEGAL ASPECTS OF SCHOOL BOARD OPERATION 190-191 (1958). See generally CAMPBELL, CUNNINGHAM, & MCPHEE, THE ORGANIZATION AND CONTROL OF AMERICAN SCHOOLS 177-182 (1965).

THE PARENT'S FUNDAMENTAL RIGHT TO RAISE A CHILD AS HE OR SHE SEES FIT

It would seem that parents should have a right to protect their children from corporal punishment in public schools under a compulsory educational system. Otherwise wealthy parents may opt to purchase more agreeable schooling for their children while poor parents can only let their children go unprotected. This principle has been cast into doubt, however, by a Supreme Court decision to affirm without comment a three judge court decision to recognize a parental right to direct one's child's upbringing, but without strictly scrutinizing any invasion of that right. The court found a state law permitting punishment against the wishes of the parent to be justified by the school's need to have a variety of flexible and immediate punishments available. *Baker v. Owen*, 395 F.Supp. 294, 296, 299 (M.D.N.C. 1975), *aff'd without comment*, 96 S.Ct. 210 (1975). The case, moreover, follows the rule formulated in AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS 2d, Sec. 153(2)(d)(1965).

The significance of an affirmance without an opinion is always debatable, of course, and sometimes courts consider it of no binding effect. *Prostrollo v. University of South Dakota*, 369 F.Supp. 778, 782 (D.S.D.), *rev'd without relying on the Supreme Court decision in issue*, 507 F.2d 775 (8th Cir. 1974), *cert. denied*, 95 S.Ct. 1687 (1975); *Poynter v. Drevdahl*, 359 F.Supp. 1137, 1141 (W.D. Mich. 1972). Whatever the merits of this view, it is likely that the Supreme Court affirmance of the case will have a powerful practical effect, and the best forum for pressing a suit against corporal punishment will now be in the state courts, or through legislative change.

Another court which has considered the parental right and rejected it is *Ware v. Estes*, 328 F.Supp. 657, 659 (N.D. Tex. 1971), *aff'd*, 458 F.2d 1360 (5th Cir. 1972). This decision appears to deny the existence of any constitutional right outside of the *Meyer* and *Pierce* decisions (discussed below). That view was modified by the same circuit, however, in *Ingraham v. Wright*, 498 F.2d 248, 271 (5th Cir. 1974):

> . . . the approach taken on this issue by the district court in *Ware* deserves re-examination in light of certain recent Supreme Court cases which touch on the relationship of parent and child and the right of privacy. [citing *Stanley v. Illinois* and *Wisconsin v. Yoder*.]

This decision will be heard again en banc. *Motion for rehearing granted*, 504 F.2d 1370 (5th Cir. 1974). The *Baker v. Owen* determination that a right does exist (even though it does not trigger "strict scrutiny") will undoubtedly have an influence in the rehearing.

Prior to the Supreme Court treatment of *Baker v. Owen*, two lower federal courts had recognized a parental right, applied strict scrutiny in examining corporal punishment, and ruled the practice unconstitutional. *Glaser v. Marietta*, 351 F.Supp. 555 (W.D.Pa. 1972); *Mahanes v. Hall*, Civil No. 304-73-R (E.D.Va., May 16, 1974). In *Mahanes* the judge additionally awarded damages to the mother whose rights had been violated when the child was physically punished.

To the extent that the Supreme Court affirmance of Baker v. Owen is ambiguous and to the extent that state constitutions may be more protective than the federal, the basis for rejecting corporal punishment as violative of parental rights needs careful review.

The right of a parent to rear a child was first recognized in Meyer v. Nebraska, 262 U.S. 390 (1923) (right of parent to enroll child in non-English speaking school); and reiterated in Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right of parent to enroll child in non-public school). It has been cited in more recent cases as well. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (right of father to custody of illegitimate child after mother's death). This right has been termed "essential" in Meyer. It was labeled "a basic civil right of man" in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (sterilization of "habitual criminals" violates equal protection). It was evaluated as "far more precious . . . than property rights" in May v. Anderson, 345 U.S. 528, 533 (1953) (invalidity of custody order against parent over whom court had no personal jurisdiction).

The three-judge court in Baker v. Owen recognized this right, but refused to strictly scrutinize limitations on it, as is required when a "fundamental" right is at stake. 395 F.Supp. at 299. The court correctly pointed out the decisions in Meyer and Pierce referred only to a test requiring a "reasonable relation" to a legitimate state purpose. See Meyer, 262 U.S. at 400; Pierce, 268 U.S. at 535. The Baker analysis is faulty, first because the invalidation of a law under the usual test says nothing about whether a stricter test must be used. It is not necessary to reach the question of which test to use. Second, the Supreme Court in fact rejected apparently legitimate state reasons for the law in Meyer -- the promotion of homogeneity of Americans. Meyer, 262 U.S. at 400. Thus, the court in Meyer was actually applying more rigorous review.

The Baker v. Owen court also rejected the stricter test on grounds that "no state law has ever satisfied this seemingly insurmountable standard," citing a dissent by Chief Justice Burger in Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972). While Justice Burger's remarks are technically true of equal protection cases, of which Dunn was an example, they are not true of cases dealing with intrusions of fundamental rights. Thus, in two cases dealing with the combined parental right and religious freedoms, the Court has applied strict scrutiny and upheld one state law while limiting, but not rejecting another. Compare Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (upholding guardian's conviction under state child labor law for permitting ward to distribute religious literature) and Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (state compulsory education law found unconstitutional as applied to the Amish).

Finally, in some recent cases the court has applied strict scrutiny to laws interfering with basic parental rights. For example, in Stanley v. Illinois, 405 U.S. 645, 651 (1972), the court clearly stated that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." The three-judge court in Baker dismissed Stanley without much explanation.

Perhaps it is best to interpret the Supreme Court's silent affirmation of Baker v. Owen as an indication that the Court is not ready to clearly articulate a new standard in dealing with personal but unenumerated rights. In any case, it is difficult to believe that the Court intended to give its blessing to the use of the reasonable relation test in cases involving the parental right.

THE CHILD'S RIGHTS

THE EIGHTH AMENDMENT: CRUEL AND UNUSUAL PUNISHMENT

The eighth amendment applies to the states and their agencies through the fourteenth amendment. Powell v. Texas, 392 U.S. 514 (1968). "Neither the fourteenth amendment nor the bill of rights is for adults alone." In re Gault, 387 U.S. 1, 13 (1967). Thus, the child should be protected from the imposition of physical abuse and humiliation if unrelated to a reasonable end of the state. Yet, the federal courts have so far rejected the argument that restrained corporal punishment in the schoolroom is violative of the eighth amendment, finding it neither cruel nor unusual. See e.g., Sims v. Walm, 388 F.Supp. 543, 549 (S.D. Ohio 1974) (not a punishment within the meaning of the eighth amendment); Ingraham v. Wright, 498 F.2d 248 (5th Cir.), rehearing en banc ordered, 504 F.2d 1379 (1974) (not "unusual" punishment); Baker v. Owen, 395 F.Supp. 294, 303 (M.D.N.C. 1975), aff'd, 96 S.Ct. 210 (1975)(not so excessive as to be cruel or unusual)(appeal to Supreme Court raised only parents' rights. See petition, Clearinghouse #15,929).

Yet corporal punishment meets the tests stated in Trop v. Dulles, 356 U.S. 86 (1958). In applying the eighth amendment to all punishments inflicted pursuant to penal law, the Supreme Court set forth two tests to determine the meaning of "penal." First, there must be the imposition of a disability for the purpose of punishment. Id. at 96. Second, there must be a purpose to punish. Id. at 97. The court here observed that "a statute that prescribes the consequences that will befall one who fails to abide by . . . regulatory provisions is a penal law."

Using similar rationales, some federal courts have found certain acts of corporal punishment in non-public school settings violative of the eighth amendment because it is "nothing more than pointless infliction of suffering," unrelated to rehabilitation and subject to abuse. The seventh circuit has held that the beatings of juveniles in the Indiana Boys School with a "fraternity paddle between 1/2" and 2" thick, 12" long, with a narrow handle constituted "cruel and unusual" punishment in violation of the eighth and fourteenth amendments. Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974). The court held at 355-56:

> The uncontradicted authoritative evidence indicates that the practice does not serve as useful punishment or as treatment, and it actually breeds counter-hostility resulting in greater aggression by a child. For these reasons we find the beatings presently administered are unnecessary and therefore excessive.

The court in Nelson v. Heyne premised its ban on corporal punishment not only on its disutility, but also on its susceptibility to abuse, id. at 356:

> The record before us discloses that the beatings employed by defendants are disproportionate to the offenses for which they are used, and do not measure up to contemporary standards of decency in our contemporary society.
>
> There is nothing in the record to show that a less severe punishment would not have accomplished the disciplinary aim. And it is likely that the beatings have aroused animosity toward the School and substantially frustrated its rehabilitative purpose. We find in the record before us, to support our holding, general considerations similar to those the court in Jackson found to be relevant: (1) corporal punishment is easily subject to abuse in the hands of the sadistic and unscrupulous, and control of the punishment is inadequate; (2) formalized School procedures governing the infliction of the corporal punishment are at a minimum; (3) the infliction of such severe punishment frustrates correctional and rehabilitative goals; and (4) the current sociological trend is toward the elimination of all corporal punishment in all correctional institutions.

In the case referred to by the Court, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), the eighth circuit held that the use of the strap in the penitentiaries of Arkansas is "cruel and unusual" punishment. The now Associate Justice Blackmun stated for the Court, id. at 579-80:

> Our reasons for this conclusion include the following: (1) We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse. The present record discloses misinterpretation and obvious overnarrow interpretation even of the newly adopted January 1966 rules. (2) Rules in this area seem often to go unobserved. Despite the January 1966 requirement that no inmate was to inflict punishment on another, the record is replete with instances where this very thing took place. (3) Regulations are easily circumvented. Although it was a longstanding requirement that a whipping was to be administered only when the prisoner was fully clothed, this record discloses instances of whippings upon the bare buttocks, and with consequent injury. (4) Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous. (5) Where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power. (6) There can be no argument that excessive whipping or an inappropriate manner of whipping or too great frequency of whipping or the use of studded or overlong straps all constitute cruel and unusual punishment. But if whipping were to be authorized, how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual? (7) Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike. It frustrates correctional and rehabilitative goals. This record cries out with testimony to this effect from the expert penologists, from the inmates and from their keepers. (8) Whipping creates other penological problems and makes adjustment to society more difficult. (9) Public opinion is obviously adverse. Counsel concede that only two states still permit the use of the strap. Thus almost uniformly has it been abolished. It has been expressly outlawed by statute in a number of states. See for example, N.D. Cent. S12-47-26 (1960); S.D. Code Sec. 13, 4715 (1939). And 48 states, including Arkansas, have constitutional provisions against cruel and unusual punishment. Ark. Const. art. 2 Sec. 9.
>
> We are not convinced contrarily by any suggestion that the State needs this tool for disciplinary purposes and is too poor to provide other accepted means of prisoner regulation. Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations or by the thickness of the prisoner's clothing.

To say school children have been beaten traditionally is not to justify it. The eight circuit has declared, id. at 580:

> We choose to draw no significant distinction between the word 'cruel' and the word 'unusual' in the Eighth Amendment. . . . We would not wish to place ourselves in the position of condoning punishment which is shown to be only 'cruel' but not 'unusual' or vice versa.

Both Jackson v. Bishop and Nelson v. Heyne were cited by the eighth circuit in Bramlet v. Wilson, 495 F.2d 714, 717 (8th Cir. 1974) where the appellate court reversed the district court which had dismissed a corporal punishment complaint. The court held that the complaint started a cause of action because "corporal punishment in some circumstances might constitute cruel and unusual punishment." Id. See also cases cited at p. 330, infra.

The precise flaws which federal courts have pinpointed as grounds for rejecting the case of corporal punishment as a disciplinary tool in juvenile correctional homes, Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974) and adult penal institutions, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) undermine the logic of using corporal punishment in public school settings as well -- it is unnecessary, dysfunctional, and subject to abuse.

European nations have long found satisfactory alternative methods. Poland abolished corporal punishment in 1783, apparently inspired by John Locke's "Some Thoughts on Education." Other European nations to follow suit include the Netherlands (1850), France (1887), Finland (1890), Sweden (1958), and Denmark (1968) as well as the U.S.S.R. and all other Communist bloc countries. Yet only two states, New Jersey and Massachusetts, so far have followed suit despite the wide range of alternative disciplinary measures available. These include warnings, additional assignments of schoolwork, physical work such as cleaning up classrooms, denial of privileges, temporary isolation, requests to parents to discipline the child, suspension and, finally, expulsion from the school. See letters to Paul Weckstein, Center for Law and Education, on the abolition of corporal punishment in various school systems. (Clearinghouse No. 16,201).

Corporal punishment is not only unnecessary; in the vast majority of cases, corporal punishment has been found to be either unrelated to or injurious to learning. As Ruth Newman, a Washington, D.C. area child psychologist and prosecution witness in Mahanes v. Hall, Civil No. 304-73-R (E.D. Va., May 16, 1974), testified, a child doesn't learn through the seat of his pants so paddling doesn't help.

Finally, the inability to prevent an abuse of the system referred to by the Jackson court, Jackson v. Bishop, 404 F.2d 571,579 (8th Cir. 1968) and the Nelson court, Nelson v. Heyne, 491 F.2d 352, 356 (7th Cir. 1974) plagues the disciplinarian in the public school as well. In Ingraham v. Wright, 498 F.2d 248, 255 (5th Cir. 1974) the circuit court observed, as the district court recognized, that the evidence revealed a rather widespread failure to adhere to School Board policy regarding corporal punishment.

The Ingraham court also remarked, 498 F.2d 248, n.26 at 262:

> The problems of control suggested in Jackson must also exist to some extent in the schools, although perhaps to a lesser degree. It is for this reason that we are especially concerned with the actual administration of corporal punishment in the Dade County schools. If we found that adequate controls did not exist, or could not be established, we would be forced to consider adopting the remedy used in Jackson, namely an injunction against any use of corporal punishment. That result must ensue if controls prove inadequate. It has been cogently argued that a total ban on this punishment is the only effective control. [Citing arguments of J. KOZOL, DEATH AT AN EARLY AGE, at 16-17 (1967) and Corporal Punishment in the Public Schools, 6 HARV. CIV. RIGHTS-CIV. LIB. L.REV. 585].

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However, the developing federal view seems to find a violation of the eighth amendment only where the punishment is excessive. E.g., Ware v. Estes, 328 F.Supp. 657, 658 (N.D. Tex. 1971), aff'd, 458 F.2d 1360 (5th Cir. 1972) (finding at least one student had been knocked unconscious); Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974) (reversing a district court's dismissal of a complaint that alleged excessive punishment). In Baker v. Owen, the three-judge district court also held that on the facts before it (two licks administered with a stick not much bigger than a rule, leaving a few bruises), there was no violation of the eighth amendment. The court observed that there would be a violation were there evidence of a more severe beating and used as examples the punishment administered in Ingraham v. Wright and Nelson v. Heyne. 395 F.Supp. at 303, aff'd without comment and on other grounds, 96 S.Ct. 210 (1975). See explanation p. 327 supra.

EQUAL PROTECTION

In special circumstances, it is conceivable that an equal protection argument might be made in these cases. It is sometimes possible to show that other people, including other youth, are protected from corporal punishment. However, the court in Gonyaw v. Gray, 361 F.Supp. 366 (D.Vt. 1973) at 368-69, after considering the lack of protection afforded public school children in Vermont, compared to that granted inmates of juvenile correction facilities, found that they were not similarly located and thus students could not raise an equal protection claim. Since school discipline shares the aim of discipline at juvenile correctional institutions, "training our children to be good citizens -- to be better citizens," id. at 369, and also since corporal punishment in the schools has been shown to be just as unnecessary, possibly counterproductive and subject to abuse as at correctional institutions, it seems a travesty of justice to force a child to become a criminal to protect his or her constitutional rights. As the Supreme Court of Indiana declared as long ago as 1853, in Cooper v. McJunkin, 4 Ind. 290, 291, 293:

> The public seems to cling to the despotism in the government of schools which has been discarded everywhere else. . . .
>
> . . .
>
> . . . The husband can no longer moderately chastise his wife; nor . . . the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy . . . should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained.

THE RIGHT TO DUE PROCESS

Courts which have rejected the arguments that corporal punishment per se or as administered is unconstitutional have still insisted on certain procedural safeguards before imposing such serious discipline on a student. See e.g., Baker v. Owen; Mahanes v. Hall, Civil No. 304-73-R (E.D. Va. May 16, 1974). Also see generally this manual section IV, at 220-21 (Procedural Due Process).

School boards have typically complained that to turn their disciplinary procedures into a full scale judicial proceding would destroy the efficacy of school administration. However, as the Supreme Court stated in Wolff v. McDonnell, 418 U.S. 539, 555-57 (1974) (holding that a disciplinary sanction involving loss of a prisoner's "good-time" violated due process):

> But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime. There is no iron curtain drawn between the constitution and the prisons of this country. . . .
>
> . . .
>
> . . . [T]he prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

The court in Mahanes v. Hall, Civil No. 304-73-R (E.D. Va., May 16, 1974) also tore down "the iron curtain" which has heretofore hung between the Constitution and the students of this country in the matter of corporal punishment in ruling young Timothy Mahane's constitutional right to due process was violated by the lack of notice of punishment or a right to question the decision to administer it. (As reported in Richmond News Leader, May 17, 1974).

The court arrived at a similar conclusion in Baker v. Owen, saying it should first be ascertained that the student understood the rule which was violated, and shall receive an informal hearing. See generally, the appendix on the minimally acceptable proceedings consistent with due process following this note.

As the court in Baker v. Owen said, 395 F.Supp. at 302:

> . . . it seems uncontrovertible that the child has a legitimate interest in avoiding unnecessary or arbitrary infliction of a punishment that probably would be completely disallowed as to an adult.

Jane Samuels and P.M. Lines
Center for Law and Education
July 30, 1975

Appendix A to Part V(C):

Some Safeguards Which Provide Minimal Due Process in Corporal Punishment Cases

In Ware v. Estes, 328 F.Supp. 657 (N.D. Tex. 1971), aff'd, 458 F.2d 1360 (5th Cir. 1972), cert. denied, 409 U.S. 1027, the formal policy of the Dallas Independent School District required that before a teacher could subject a pupil to corporal punishment the case was to be examined by a Pupil Personnel Committee. When that committee made a determination that under the particular facts and circumstances presented to them corporal punishment was to be administered by the teacher it could only be done in the presence of an adult witness after receiving written permission from the child's parents. Id. at 658.

In Glaser v. Marietta, 351 F.Supp. 555, 556 (W.D. Pa. 1972), the court approved the following regulations regarding the use of corporal punishment in the Northgate School District:

> Corporal punishment must be regarded as a last resort and may be employed only in cases where other means of seeking cooperation from a student have failed. The Bellevue School Board requires that, if it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal or assistant principal. The principal and the teacher must be in agreement on the necessity of corporal punishment, and it is the principal's responsibility to designate time, place, and the person to administer said punishment. In any case, the pupil should understand clearly the seriousness of the offense and the reasons for his punishment; however, care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety to the pupil. The punishment must be administered in kindness in the presence of another adult and at a time and under conditions not calculated to hold the child up to ridicule or shame.
>
> In administering corporal punishment, the teacher and principal must not use any instrument which will produce physical injury to the child and no part of the body above the waist or below the knees may be struck.
>
> Corporal punishment should never be administered to a child whom school personnel note to be under psychological or physical treatment, without a conference with the psychologist or physician.

In Sims v. Board of Educ., 329 F.Supp. 678 (D. N.Mex. 1971) the policy of the Board was set forth as follows in the Teachers' Handbook of Independent School District No. 22, id. at 680.

> The most advanced educational theory opposes corporal punishment in the school. By

> and large, the administration of our schools supports this theory. However, it must be recognized that situations arise which can be considered exceptions to the rule. When other means have repeatedly failed, it may be necessary for the school authorities to administer a "spanking" to come recalcitrant pupil. When this is necessary, the punishment shall be administered by the school principal or if administered by the teacher, it should be witnessed by the principal or his designated representative in his absence.

The court found the complaint failed to state a cause of action. Id. at 690.

In Baker v. Owen, 395 F.Supp. 294 (M.D. N.C. 1975), aff'd without comment, 96 S.Ct. 210 (1975), the court held initially that the use of corporal punishment must be approved, not in each individual instance, but in principle, by the principal before it may be used in a particular school. It then set forth the following rule 5, id. at 302-03:

> . . . First, except for those acts of misconduct which are so anti-social or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehavior. The requirements of an announced possibility of corporal punishment and an attempt to modify behavior by some other means -- keeping after school, assigning extra work, or some other punishment -- will insure that the child has clear notice that certain behavior subjects him to physical punishment. Second, a teacher or principal must punish corporally in the presence of a second school official (teacher or principal), who must be informed beforehand and in the student's presence of the reason for the punishment. The student need not be afforded a formal opportunity to present his side to the second official; the requirement is intended only to allow a student to protest spontaneously, an egregiously arbitrary or contrived application of punishment. And finally, an official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present.

Finally, following the Court's decision in Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974), the following rules were promulgated by Florida's attorney-general:

> 1. A student must know and understand the rule under which he is to be punished. School authorities must tell the student before he is punished precisely what he has done which merits punishment.
>
> 2. If the student concedes he has engaged in misconduct, it must then be determined if corporal punishment should be administered and the details of its administration. Those decisions should be made by someone who was not directly involved in the circumstances surrounding the alleged misconduct.
>
> 3. If the student concedes that he has engaged in certain conduct, but claims he did not know it was prohibited, school authorities should proceed with caution. Inquiry should be made to determine if the student knew or should have known that his conduct violated school policies. To aid in this determination, written rules of conduct should be published and distributed within the school system.
>
> 4. If the student claims he is innocent, school officials should make sufficient inquiries to determine guilt beyond a reasonable doubt. This means that witnesses should be questioned and students given the opportunity to call their own witnesses. The student should be afforded the right to respond to witnesses against him and in some cases he should be accorded the opportunity to question adverse witnesses.

5. Alternative measures which range from parent and student conferences, and the use of guidance counselors and psychologists, to suspension and expulsion should also be considered with the age of the student and the possible risk of physical and psychological damage before a student is corporally punished.

6. Corporal punishment should never be administered to a student who school personnel know or have reason to believe is under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician.

7. Punishment should be administered "posteriorly" and under no circumstances shall a student be struck about the head, shoulders, hands, etc.

8. Elementary school children may be struck in a maximum of five strokes and junior and senior high school students a maximum of seven strokes with an instrument calculated to eliminate possible physical injury.

Opinion No.074-256A, Nov. 14, 1974, Clearinghouse No. 14,039

Appendix B: Recent Corporal Punishment Cases

CASE	PLAINTIFF'S CLAIM: CORPORAL PUNISHMENT ILLEGAL PER SE	EXCESSIVE UNREASONABLE CRUEL OR UNUSUAL AS ADMINISTERED	PROCEDURAL DUE PROCESS VIOLATED	PARENT'S RIGHTS VIOLATED
Gonyaw v. Gray, 361 F.Supp.366(D.Vt.1973)	rejected		rejected	
Roberts v. Way, Civil No.74-302 (D.Vt.)		pending	pending	pending
Sims v. Waln, 388 F.Supp. 543(S.D.Ohio 1974)	rejected			
Ortega v. Guadalupe Union Sch.Dist., Civil No. SM 12821 (Cal. Super. Ct., June 4, 1973) (Clearinghouse No. 14,457)	pending	pending		pending
Wynn v. Nix, Civil No. 74-1566A (N.D.Ga., filed Aug. 5, 1974)				pending
Dixon v. Youngstown City Bd. of Educ., Civil No. C 73-1188Y (N.D.Ohio, Nov. 14, 1973) (Clearinghouse No. 12,441)(dismissal of three judge action, July, 1975)	pending	pending	pending	pending
Horvath v. Reeves, Civil No. 73-923774 (Ohio C.P.Cayuhoga County,Dec.17, 1973)(Clearinghouse No. 14,778)[1]	pending	pending	pending	pending
Baker v. Owen, 395 F.Supp. 294 (M.D.N.C.), aff'd without comment, 96 S.Ct. 210 (1975)	rejected	rejected	sustained	rejected
Ware v. Estes, 328 F.Supp. 657 (N.D.Tex. 1971) aff'd, 458 F.2d 1360 (5th Cir.) cert. denied, 409 U.S. 1027 (1972)	rejected			rejected
Sims v. Board of Educ. of Ind. Sch. Dist. No.22, 329 F.Supp. 678 (D.N.M. 1971)	rejected	rejected	rejected	
Glaser v. Marietta, 351 F.Supp. 555(W.D.Pa.1972)	rejected		rejected	sustained
Mahanes v. Hall, Civil No. 304-73-R (E.D. Va., May 16, 1974)	rejected		sustained	sustained
Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974) (reversal and remand)		pending	pending	pending
Jackson v. Redmond, Civil No.75-C-461(N.D.Ill., Feb.11, 1975)(Clearinghouse No. 14,611)	pending	pending	pending	
Fiske v. Board of Educ. of Los Angeles, Civil No. C 22276 (Cal.Super.Ct., Feb. 7, 1972)	pending	pending	pending	
Ingraham v. Wright, 498 F.2d 248 (5th Cir.) rehearing en banc ordered, 504 F.2d 1379(1974)	rejected	pending[2]	rejected[3]	pending

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1. Also raises equal protection and other claims.
2. Cruel and unusual and violative of substantive due process--for entire school--established prima facie.
3. Some procedural rights recognized but found protected by school policy here.

V(D)

Other Unacceptable Punishments: Grade Reduction and Loss of Financial Aid

The Center for Law and Education believes that not only should corporal punishment be banned from the school system for the reasons outlined in Part V(C), *supra*, but also that grade reductions and suspension or elimination of financial aid are also inappropriate disciplinary measures. Both techniques have recently been successfully challenged in court. An attack on grade reduction may be premised on a due process requirement, and ultra vires theory, or state or federal law requiring accurate reporting of grades. Successful litigation of the financial aid suspension issue has basically depended on the overbreadth and vagueness doctrines, although there is now a case which argues that termination of financial aid may not indirectly exclude an indigent from school for reasons which would not be constitutionally sufficient for a direct exclusion.

GRADE REDUCTION

Courts have been traditionally reluctant to grant judicial review to academic grades *qua* grades.

> [I]n matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other non-educational tribunals. It is only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student.

Connelly v. University of Vermont, 244 F.Supp. 156, 160 (D.Vt. 1965)

Accord: *Depperman v. University of Kentucky*, 371 F.Supp. 73 (E.D. Ky. 1974); *Brookins v. Bonnell*, 362 F.Supp. 379 (E.D. Pa. 1973); *Wong v. Regents of the Univ. of California*, 15 Cal. App. 3rd 823, 93 Cal. Rptr. 502 (1971); *Militana v. University of Miami*, 236 So.2d 162 (Fla. 1970); *Cieboth v. O'Connell*, 236 So.2d 470 (Fla. 1970); *Mustell v. Rose*, 282 Ala. 358, 211 So.2d 489 (1968); *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805 (1932); *West v. Board of Trustees of Miami Univ.*, 41 Ohio App. 367, 181 N.E. 144 (1931); *Barnard v. Inhabitants of Shelbourne*, 222 Mass. 76, 109 N.E. 818 (1915); *Gleason v. University of Minnesota*, 104 Minn. 359, 116 N.W. 650 (1908); *Miller v. Dailey*, 136 Cal. 212, 68 P. 1029 (1902).

Such an abuse of discretion may be found where school authorities have acted in bad faith, arbitrarily or capriciously. The burden of proof is on the student. Greenhill v. Bailey, 378 F.Supp. 632, 633 (S.D. Iowa 1974); Gasper v. Burton, 513 F.2d 843 (10th Cir. 1975). As late as 1969, one authority observed no student had successfully met that burden. Wright, Constitution on Campus, 22 VAND. L. REV. 1027, 1069 (1969). However, recently courts have expressed judicial concern about disciplinary action disguised as academic evaluation. See the discussion in Luckacs v. The Curators of Univ. of Missouri, Civil No. 74 CV 109-C (W.D.Mo., Jul. 23, 1974) (Clearinghouse No. 15,370) in which the judge, who dismissed the suit, implied that the presence of the certain facts would result in a finding for the plaintiff. The judge dismissed for the following reasons:

> There is no evidence in this record which discloses that the action taken by the Promotions and Advisory Committee was for disciplinary purposes. Although "academic" performance in Medical School at the University of Missouri-Columbia involves considerations of "attitude," there is no evidence that judgment of the propriety of defendants' "attitude" in arriving at his academic grade was based on his exercise of rights guaranteed by the Constitution, or that the dismissal of the plaintiff on academic grounds was a disguised disciplinary action.
>
> There is no evidence in this case, that plaintiff was assigned course grades which were in any way arbitrary, or that the defendants' performance was evaluated in a manner different from that employed in evaluation of the other students at the University of Missouri-Columbia Medical School. And, plaintiff has adduced no evidence which would tend to establish that he was discriminated against on a constitutionally impermissible basis. In summary, plaintiff has adduced no evidence which would establish that the system of performance evaluation employed by the Medical School was applied to him in a manner which would give rise to a claim that his rights as guaranteed by the Constitution were violated.

Where the student can prove that the academic sanction was to discipline the student for constitutionally protected behavior, the requisite bad faith is present and the student should prevail. For example, a case has held that a school may not deny a diploma as punishment for exercising a constitutional right. In Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972), the court found that refusing to graduate a student because of his refusal to take a required R.O.T.C. training course (the mandatory alternative to one year of physical education which his school did not provide to males) transgressed his freedom of belief as a conscientious objector. But see Sapp v. Renfroe, 372 F.Supp. 1193 (N.D.Ga. 1974), aff'd, 511 F.2d (5th Cir. 1975) (requirement upheld where student's objection was based solely on personal repugnance to killing, not religious beliefs). Cf. Long v. Zopp, 476 F.2d 180 (1973) (awards earned in academics or athletics cannot be used to enforce compliance with unconstitutional hair length code).

What of the student who is being disciplined for actions that were not exercises of constitutional rights? A California case relying on state law, Coats v. Governing Bd. of Cloverdale Unified Sch. Dist., Civil No. 80029 (Cal. Super. Ct., Jan., 1975) (Clearinghouse No. 14,462) involved a student who refused to run a lap around his high school gymnasium and, as a result, was given a failing grade which prevented his graduation. The plaintiff argued that the Governing Board lacked the authority under the California Educational Code to permanently exclude a student from a course of instruction and that the sanction as applied to physical education was directly contrary to the legislature's manifested concern that each student demonstrate proficiency in physical education. (Plaintiff's Brief at 4.) He further argued that since in California, education is a fundamental must be justified by showing a compelling state interest. Since the plaintiff had satisfied all academic requirements and evidenced a willingness to continue taking physical education it is unlikely that the state could have met even the ordinary test, requiring only a rational basis. After hearing the arguments the Court issued a mandamus stating that the Board had "acted in excess of [its] statutory authority and/or violated the petitioner's constitutional rights." Id.

A recent grade reduction case, Dorsey v. Bale, 521 S.W.2d 76 (Ky.App.Ct. 1975), involved a student whose grades were reduced automatically by regulations authorizing this as additional punishment for unexcused absences caused by the student's suspension from classes. The student's grades were reduced by five percentage points for each of the four days he was suspended, resulting in a reduction of one letter in three of five courses. The Court held that such action was ultra vires, as the state statute under which the student was suspended specified permissible punishment and, in effect, pre-empted the right of school officials to impose additional punishment. Also see generally this manual, Part II, supra, on the ultra vires doctrine.

It is sometimes difficult to separate academic and disciplinary considerations in obtaining judicial review. Teachers may unconsciously discount the grades of those students they identify as disciplinary problems. See e.g. Dawson v. Hillsborough County, Fla. Sch. Bd., 322 F.Supp. 286, 302 (M.D.Fla. 1971) (long-haired students do better on uniformly administered machine-graded tests than they do in classrooms in which their violation of the hair code may affect their grades) (dictum).

If a student is failed out of school and alleges that it was for reasons other than quality of academic work, the court should order a hearing into the matter. Brooking v. Bonnell, 362 F.Supp. 379 (E.D.Pa. 1973) (nursing student entitled to preliminary injunction where she was allegedly expelled for a failure to submit a personal medical record, failure to report prior attendance at a hospital school of nursing and submit a transcript thereof and failure to attend class regularly). In such cases the student should be accorded full procedural due process. See also Gasper v. Burton, 513 F.2d 843 (10th Cir. 1975) citing Goss v. Lopez, 94 S.Ct. 729 (1975), discussed in Part IV, at p. 222 supra. See also Weckstein, 20 INEQUALITY IN EDUC. 47 (July, 1975).

Another argument may be made under any state law that requires accurate reporting of grades or pupil's progress.

Similarly, a student might challenge the grades as "inaccurate, misleading or otherwise inappropriate data" in the student's education record within the meaning of the Family Educational Rights and Privacy Act ("the Buckley Amendment").

Section 438(a) (2) of the Buckley Amendment provides an opportunity ". . . to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading or otherwise in violation of the privacy or other rights of students . . . ." However, in a joint statement, the sponsors (Senators Buckley and Pell) assured Congress that this section is not to be used as a means of contesting grades which the student and parent think should be higher. It could, nonetheless, be argued that a student does not question the authority of teachers or schools to evaluate performance when he or she challenges the assumed authority to make academic grades inaccurate or misleading by introducing inappropriate disciplinary considerations into the grading process. A failing grade in math is inaccurate or misleading to parents, colleges, employers and others if the student in face did satisfactory work in the subject but was disruptive in class. See also Weckstein, "Access to Students' Public School Files," Center for Law and Education (1973).

LOSS OF FINANCIAL AID

Where a disciplinary sanction involves the loss of financial aid, an indigent student will then be prevented from further attendance at the school. A pending case on this point is Manwell v. Wood, Civil No. 73-4262-G (D.Mass. filed Dec. 20, 1973). This case presents the issue of whether a public university may indirectly exclude an indigent student--through the termination of his financial support--for reasons that would not support exclusion if undertaken directly. The plaintiff was a graduate student at the University of Massachusetts, but was forced to suspend his studies for one year when his teaching assistantship was terminated. Thereafter, when he sought to resume his studies, his application for readmission was denied. After the University flatly refused to negotiate on his readmission, he filed suit, claiming that a failure to renew financial assistance, which operated to exclude him from the opportunity to continue his education, cannot be effectuated without due process. He also contended that even if it is permissible to terminate his financial support, a decision barring him from continuing his studies constitutes an exclusion from school which must be attended by due process. The case, when decided, will be the first to directly deal with indirect exclusion through termination of financial aid for reasons which would not support his direct exclusion.

Other decisions lend some support to students. The court in Green v. Dumke, 480 F.2d 624 (9th Cir. 1973) found that a fist-fight at a campus-wide meeting and a subsequent battery conviction were not sufficient to deny the student federal financial aid, as required by federal law, where the student committed a crime of a "serious nature" intended to disrupt the work of the institution. The Court interpreted the Act as not directed towards those exercising first or fifth amendment rights or those who were guilty of "student pranks" even if the pranks also constituted a crime involving force. Id. at 630. Another attack on these laws can be made under the vagueness doctrine. Rasche v. Board of Trustees, 353 F.Supp. 973 (N.D.Ill. 1972) (same federal law as Green v. Dumke); Undergraduate Student Ass'n v. Peltason, 367 F.Supp. 1055 (N.D.Ill. 1973) (state law similar to above); Corporation of Haverford Col. v. Reeher, 329 F.Supp. 1196 (E.D.Pa. 1971) (same). The Court in Haverford College observed, id. at 1203:

> The loss of financial aid may have an even more drastic effect than expulsion or suspension, and its deterrent effect on students must be as great as that of many criminal statutes.

The Court also noted that ineligibility for financial aid may mean the end of a college career for some students. Id. at 1207.

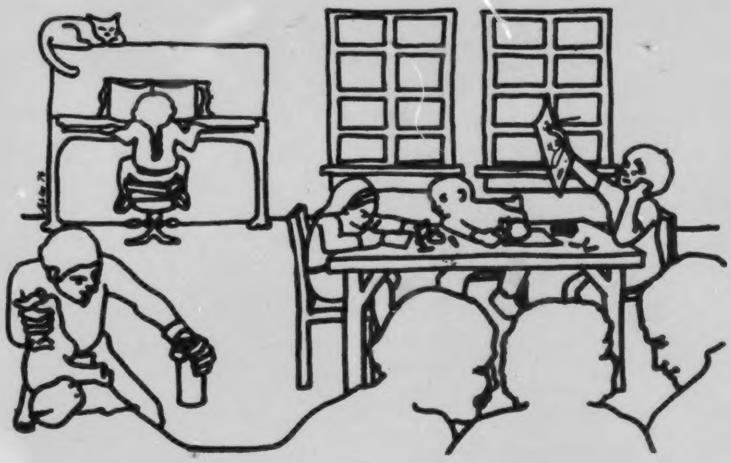
Jane Samuels
Center for Law and Education
August 15, 1975

V(E)

Behavior Modification Through Drugs:
A Legal Approach to an Ethical Problem

The use of drugs to modify delinquent behavior of school-children moved out of the pages of Orwell's 1984 and on to the front page of the Washington Post in June, 1970. The Post reported that between five and ten percent of elementary school pupils in Omaha, Nebraska were being given stimulants in an attempt to modify their classroom behavior. Washington Post, June 29, 1970, p.1. Although that story was later revealed to be an overstatement of the situation in Omaha, a Congressional report estimated that nationally between 150,000 and 300,000 children diagnosed as suffering from a behavioral disorder known as hyperkinesis or minimal brain dysfunction (MBD) were being drugged in the name of education. Hearings on Federal Involvement in the Use of Behavior Modification Drugs on Grammar School Children before the Subcommittee on the Right to Privacy of the House Committee on Government Operations, 91st Cong., 2nd Sess. 1 at 16 (1970).

The first half of this note discusses hyperkinesis in general terms, suggesting some of the problems in the diagnosis and treatment of this syndrome. The second half focuses on protecting a juvenile's right to be free from undesired/undesirable medication under the penumbra theory of privacy, the equal protection clause and the due process clause of the constitution.



Reprinted with permission from the publishers of the Free Valley Advocate, a weekly paper located in western Massachusetts. The schoolroom depicted is an example of one where drugs are not administered to children.

HYPERKINESIS: A GENERAL INTRODUCTION

Approximately three to ten percent of all grammar school children in every socioeconomic group display some symptoms of hyperkinesis. *Hearings*, *supra* at 10. These symptoms fall roughly into two categories: increase of purposeless activity and impaired span of focused attention. Paradoxically, some doctors believe that the use of stimulants on hyperkinetic children calms them down and focuses their attention. Generally the research on effects of stimulants is mixed. See Greenspoon and Singer, *Amphetamines in the Treatment of Hyperkinetic Children* 43 HARV. EDUC. REV. 515 (1973). However, the symptoms of hyperkinesis, such as fidgeting and daydreaming are also symptoms of many other childhood problems. The child may also be suffering from hunger, physiological problems such as hearing or visual disorders, retardation, psychological problems unrelated to hyperkinesis or simple boredom.

A diagnosis of hyperkinesis should not be made without a full battery of tests including several I.Q. tests, both verbal and nonverbal, tests of achievement and perception, as well as a full neurological examination including extensive surveys of the child's motor development and a complete physical examination with the taking of a medical and family history. Even then

> . . . [N]o battery of tests has been adequately standardized in insuring discrimination of [hyperkinetic] patients from those suffering only from psychogenic or cultural deficits.

C.K. Connors, *The Syndrome of Minimal Brain Dysfunction*, Pediatric Clinics of No. America, No.25 at 750 (1967).

The stimulant drug itself is used as a conclusive diagnostic tool. If the child does not respond favorably to stimulants, he or she is no longer considered hyperkinetic; if behavior improves, the treatment continues. About one-third to one-half of the children tentatively diagnosed as hyperkinetic may be forced to take the drug only to discover they do not benefit from it. Even the improved behavior of those who do respond to treatment may not be wholly due to the medication. As Dr. Serena Stier has pointed out, some hyperkinetic children improve when taking a drug, including a placebo. W. Wells, *Drug Control of School Children: The Child's Right to Choose*, 46 S. CAL. L. REV. 585, 591 (1973). In addition to the placebo effect, there is the problem of estimating observer bias. One parent testified before a congressional committee that he told the child's teacher that a doctor had prescribed a stimulant for his supposedly hyperkinetic child, but did not add that the child was not in fact taking them; the teacher soon reported a marked improvement in the child's behavior. *Hearings*, *supra* at 343.

There may also be harmful side effects. Ritalin, one of the most frequently prescribed stimulants, not only can aggravate a patient's preexisting characteristics of marked anxiety, tension and agitation, but can sometimes cause nausea, dizziness, palpitations, skin rash, blood pressure and pulse changes, angina and cardiac arrhythmia. *Med. World News*, Jan. 15, 1971. Also, loss of appetite with an associated weight loss and insomnia appear in twelve to fourteen percent of those treated. Furthermore, there have been no long range studies on possible accumulation of toxic materials in the hyperkinetic child. While in the short run no chronic toxicity has appeared in studies, W. Wells, at 596, a recent study has hinted long term amphetamine use can cause death within five years for those suffering from an untreated blood disorder called necrotizing angillus.

Even if such drugs are shown not to be physically addictive or harmful, the child may still develop an injurious psychological dependency. Stories are reported of children who call the Ritalin pills "magic pills" because of increased popularity with teachers and schoolmates after taking them. Wells, at 599.

Even more harmful, however, is the effect the medication may have on the child's perception of reality. If the child is subjected only to the standard classroom controls, he is left mentally free to experience events in their totality, learning from them and strengthening his own mental controls. Several studies of children who had received amphetamines show that although the more pronounced manifestations of restlessness were diminished, attentional handicaps persisted. Greenspoon and Singer, Amphetamines in the Treatment of Hyperkinetic Children, 43 HARV. EDUC. REV. 515, 528-34 (1973). These learning diabilities can be overcome or mitigated through such alternative methods as special learning classes, systematic rewarding of desirable behavior and conseling.

Finally, there is the fear that "there is a very great temptation to diagnose the bored but bright child as hyperactive [hyperkinetic], prescribe drugs, and thus deny him full learning during his most creative years." Hearings, at 3, no.2. As noted educator John Holt said, the "learning malady called hyperkinesis," id. at 33, is really a child's attempt to learn from his environment, id:

> We consider it a disease because it makes it difficult to run our schools as we do, like maximum security prisons, for the comfort and convenience of the teachers and administrators who work in them. The energy of children is "bad" because it is a nuisance to the exhausted and overburdened adults who do not want to or know how to and are not able to keep up with it. Id.

FREEDOM FROM INDISCRIMINATE MEDICATION
SOME LEGAL THEORIES

There is very little case law involving challenges to school officials' authority to administer drugs to children. In cases involving comparable problems, the courts have found a right of juveniles to "freedom from indiscriminate, unsupervised, unnecessary or excessive medication, particularly psychotropic medication." Morales v. Turman, 383 F.Supp. 53, 105 (E.D.Tex. 1974) (civil action concerning both the adjudicatory and post-adjudicatory status of the juvenile justice system in Texas). See also Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir. 1974) (juvenile offenders); Welsch v. Likins, 373 F.Supp. 487 (D.Minn. 1974) (mental retardates); Accord Wyatt v. Stickney, 344 F.Supp. 387 (M.D.Ala. 1972) (mental retardates). The Morales line of cases is based on a right to be free from indiscriminate medication derived from the prohibition against cruel and unusual punishment in the eighth amendment. The right to be free of medication may also be based on a right to privacy, as discussed in this note, and the equal protection clause, also discussed below. If the court fails to accept these arguments, it must nonetheless recognize due process rights of students and insist on certain minimal procedures to safeguard those rights.

The clearest statement of a student's right to privacy is made by the court in Merriken v.

Cressman, 364 F.Supp. 913 (E.D.Pa. 1973) which upheld a student's right to refuse to take a personality test designed to reveal potential drug abusers, *id.* at 918:

> The fact that the students are juveniles does not in any way invalidate their right to assert their Constitutional right to privacy. . . . This court would add that the right to privacy is on an equal or possibly more elevated pedestal than some other individual Constitutional rights and should be treated with as much deference as free speech.

While the Constitution does not explicitly mention the right of privacy, the Supreme Court has recognized such a right as far back as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). The court more recently observed:

> Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.
>
> . . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

Stanley v. Georgia, 394 U.S. 557, 565-66 (1968).

As one writer has pointed out, the protection of this individual right benefits society as a whole:

> The personal interest to be protected by a right to privacy is the individual's interest in preserving his essential dignity as a human being. It is his interest in securing the autonomy of his personality. It is an interest that society shares, because a society cannot long endure that is unable to preserve to its members the autonomy of their personalities. If the right is broad enough to deserve that interest, it is grand enough to deserve the tribute that it is the most comprehensive of rights and the most valued.

Hufstedler, *The Directions and Misdirections of a Constitutional Right to Privacy,* 26 RECORD OF N.Y.C.B.A. 546, 550-51 (1971).

An excellent summary of cases in which the Supreme Court has found the right under various constitutional theories may be found in *Roe v. Wade*, 410 U.S. 113, 152-53 (1972):

> In varying contexts, the Court of individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S.557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968), *Katz v. United States*, 389 U.S. 347, 350 (1967); *Boyd v. United States*, 116 U.S. 616 (1886), see *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. at 484-485; in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S, at 453-454 *id.*, at 460, 463-465 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer v. Nebraska*, *supra*.

This right "to be free, except in limited circumstances, from unwanted governmental intrusions into one's privacy" is fundamental. *Stanley v. Georgia*, 394 U.S. 557, 564 (1968). "The makers of our Constitution . . . conferred as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men." *Id.*, quoting part of Mr. Justice Brandeis' famous dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

EQUAL PROTECTION

The equal protection clause may also deter indiscriminate medication. *See generally*, Part III(C), *supra*. The right to privacy in the area of bodily integrity may be found to be a fundamental right which triggers the compelling state interest test where one class of persons has been deprived of this right. See *e.g.*, *Rochin v. California*, 342 U.S. 165 (1952) (stomach pumping to extract contraband offensive to sense of justice):

> It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."

But see *Schmerber v. California*, 384 U.S. 157 (1966) (test to determine alcohol content of blood upheld).

Although the court in *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) observed that education is not a fundamental federal right, it did recognize its major importance in society. State courts, in addition, may uphold a state constitutional right to education. *Serrano v. Priest*, 5 Cal. 3rd, 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). Thus, if a child is suspended from school for refusing psychotropic medication, the state must again show a compelling and overriding interest in doing so. See *infra*, Part III(C). Not only is it exceedingly doubtful that the state can show a compelling interest in the forcible drugging of a child, a libertarian court would not find even the usual test (the rational basis test) met:

> When available treatments cannot be confidentially and appropriately delivered by physicians, they are perhaps best withheld until such treatments can be provided.

"Dept. HEW Conference on Stimulant Drugs for Disturbed School Children," 8 INEQUALITY IN EDUC.18 (1971).

The doping of hyperkinetic children is readily distinguishable from those cases in which the courts have found sufficient justification to permit vaccinating all school children. See *e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Zucht v. King*, 260 U.S. 174 (1922). Not only is drugging more directly and incontrovertibly tied to the harm to be prevented and of less obvious benefit (1/3 - 1/2 of the children who are doped with stimulants have either no reaction or an adverse reaction), but also *all* children are required to have vaccinations.

See also R. Ireland and P.D. Dimond, *Drugs and Hyperactivity: Process is Due*, 8 INEQUALITY IN EDUC. 19, 24 n.4 (1971).

PROCEDURAL DUE PROCESS

It seems apparent that there are adequate constitutional bases to prohibit the drugging of a child without voluntary and informed parental consent. Cf. Wyatt v. Stickney, 344 F.Supp. 387 (M.D. Ala. 1972) (behavior modification programs involving use of noxious or aversive stimuli shall be conducted only with express, informed and voluntary consent.) If drugs must be given to children, they should be entitled to the same protection as an adult as they try to steer a course between the Scylla of Orwellian New-think and the Charybdis of hyperkinetic no-think. Procedures guaranteeing minimal due process should include: (1) minimal adversary scrutiny, (2) complete medical and psychological examinations of the child independent of the school authorities' diagnosis, (3) the unsuccessful use of alternative remedies, and (4) close medical supervision and periodic review. See generally, this manual, section IV, supra.

In sum, to quote courts faced with this kind of problem:

> Students are persons under the Constitution; they have the same rights and enjoy the same privileges as adults. Children are not second class citizens. Protections of the Constitution are as available to the newborn infant as to the most responsible and venerable adult in the nation.

Merriken v. Cressman, 364 F.Supp. 913 (E.D.Pa. 1973), quoting Miller v. Gillis, 315 F.Supp. 94 (N.D. Ill. 1964).

Jane S. Samuels
Center for Law and Education
August 15, 1975

Appendix to Part (V)(E):

Mass. Statutes on Use of Behavior Modification Drugs

No person shall administer or cause to be administered to a pupil in any public school in the commonwealth any psychotropic drug included on a list to be established by the department of public health unless the school has obtained certification by the commissioner of public health or his designee that the administration of such drugs in school is a legitimate medical need of the pupil. Administration of duly approved medication shall be carried out only by a registered nurse or a licensed physician. No person shall administer psychotropic drugs to such a pupil for the purposes of clinical research. The department of public health shall make rules and regulations setting forth a list of subject psychotropic drugs and procedures for certification.

MASSACHUSETTS GENERAL LAWS Chapter 71, s.54B
(signed by Governor 9/21/73)

VI.

Remedies

VI. Remedies

Examples of remedies that courts have ordered are set forth below, followed by a copy of the Supreme Court decision in Wood v. Strickland, where the court recognizes a damages for an expulsion from school executed without procedural due process.

DAMAGES

Wood v. Strickland, 420 U.S. 308 (1975) (holding that school officials are liable for damages if plaintiffs can establish bad faith in violating procedural due process requirements) (reproduced in full in the appendix, infra at 357.)

Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975)(damage award of $100 vacated and case remanded for consideration of presense of bad faith)

Caplin v. Oak, 356 F.Supp. 1250 (S.D.N.Y. 1973)(pre-Wood case; damages for preventing literature distribution denied)

Boyd v. Smith, 353 F.Supp. 844 (N.D. Ind. 1973)(agreeing that school officials are not immune to damages claims under 42 U.S.C. 1983, but dismissing complaint for other reasons)

Cf., Pierson v. Ray, 386 U.S. 547, 555-557 (1967)(good faith a defense to damages action under 42 U.S.C. 1983 against police)

Cf., Monroe v. Pape, 365 U.S. 167 (1961)(holding police liable for damages under 42 U.S.C. 1983)

In Re H., 337 N.Y.S.2d 969 (Family Ct. of NYC, Oct. 16, 1972)(ordering damages of $2500 for exclusion of handicapped child from schools)

Cf., McCrary v. Runyan, 515 F.2d 1082 (4th Cir. 1975)(damages proper to compensate for "embarrassment, humiliation and mental anguish," because of denial of admission to black students by private school)

Cf., Endress v. Brookdale Community Col., Civil No. C-180S-74 (N.J. Super. Ct., Apr. 30, 1975) (ordering $10,000 in attorneys fees, $10,000 in compensatory damages [for loss of one year's contract] and punitive damages against each defendant at $10,000 each for dismissal because of editorial she wrote for the student newspaper.)

ATTORNEY FEES

Alyeska Pipeline Service Co. v. The Wilderness Society, Civil No. 73-1977 (U.S.S.Ct. May 12, 1975)(42 Law Week 4561)(rejection of the "private attorney general" approach for collecting attorneys' fees; absent statutory authorization, the prevailing litigant cannot recover attorneys' fees under the American rule)

Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975)(defendants' "obdurate obstinacy" provides a basis for exception to the American rule; post-*Alyeska* case but does not cite *Alyeska*; award of $4,429.60 attorneys' fees affirmed)

EXPUNGEMENT OF RECORDS

Goss v. Lopez, 419 U.S. 565 (1975)

Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973)(record expunged and plaintiffs reinstated) (literature case), subsequent appeal at 517 F.2d 3 (4th Cir. 1975)

Pervis v. LaMarque Ind. Sch. Dist., 466 F.2d 1054, 1058 (5th Cir. 1972)(literature distribution)

Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972)(literature distribution)

Dunn v. Tyler Ind. Sch. Dist., 327 F.Supp. 528, 536 (E.D. Tex. 1971), *aff'd on this point*, 460 F.2d 137, 146-147 (5th Cir. 1972)(violation of procedural due process)

Quarterman v. Byrd, 453 F.2d 54, 60-61 (4th Cir. 1971)(literature distribution)

Hatter v. Los Angeles City High Sch. Dist., 452 F.2d 673 (9th Cir. 1971)(symbolic expression) (expungement after student is reinstated)

Vail v. Board of Educ., 354 F.Supp. 592 (D.N.H.)(literature distribution), *remanded for additional relief*, 502 F.2d 1159 (1st Cir. 1973)

United States v. Wilcox County Bd. of Educ., Civil No. 3934-65-H (S.D. Ala., May 14, 1973) (order)

Caldwell v. Cannady, Civil No. 5-994 (N.D. Tex., Jan. 27, 1972)(order)(Clearinghouse Review No. 7424A)

Breen v. Kahl, 296 F.Supp. 702,710 (W.D. Wis. 1969), *aff'd*, 419 F.2d 1035 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970)(hair case)

Goldwyn v. Allen, 54 Misc.2d 94, 28 N.Y.S.2d 899 (N.Y. Sup. Ct. 1967)(violation of procedural due process)

In Re Brociner, 11 N.Y. Ed. Rep. 204, 205 (1972)(N.Y. Ed. Comm'r)(literature case)

Cf., *Mailloux v. Kiley*, 323 F.Supp. 1387, 1393 (D.Mass. 1971)(ordering expungement of teacher's record), *aff'd*, 436 F.2d 565 (1st Cir. 1971)(speech/obscenity case)

PREVENTING RE-ENTRY ON EXPUNGED RECORD IF MISLEADING

Dunn v. Tyler Indep. Sch. Dist., 460 F.2d 137 (5th Cir. 1972)(notation, although correct and based on due process, would be misleading because some students had graduated while court order was in effect which had temporarily expunged their records)

REINSTATEMENT OF PLAINTIFF

Papish v. Board of Curators, 410 U.S. 667, 671 (1973)(literature case)

Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973)(literature case)

Woods v. Wright, 334 F.2d 369 (5th Cir. 1964)

DeJesus v. Penberthy, 344 F.Supp. 70, 78 (D. Conn. 1972)(order permitting plaintiff to reapply for reinstatement)

Gardenhire v. Chalmers, 326 F.Supp. 1200, 1206 (D. Kan. 1971)(reinstatement pending hearing, but court stayed order for one month to permit university to hold hearing)

Trujillo v. Love, 322 F.Supp. 1266, 1271 (D. Colo. 1971)(literature case)

Dickey v. Alabama State Bd. of Educ., 273 F.Supp. 613 (M.D. Ala. 1967), *vacated as moot sub. nom.*, *Troy State Univ. v. Dickey*, 402 F.2d 515 (5th Cir. 1968)(demonstration case)

But see: *Jones v. Snead*, 431 F.2d 1115, 1117 (8th Cir. 1970):

> . . . any determination that the students' college hearing violated due process will not necessarily mandate reinstatement, only a new hearing.

NULLIFYING ACADEMIC SANCTIONS

Papish v. Board of Curators, 410 U.S. 667, 671 (1973)(Restoration of earned academic credit which had been denied in literature case)

Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960, 975 (5th Cir. 1972)(eliminate zeroes in literature distribution case)

Vail v. Board of Educ., 354 F.Supp. 592, 604 (E.D. Pa.) *remanded far additional relief*, 502 F.2d 1159 (1st Cir. 1973)(literature distribution case; court ordered a study and report to it on grading effects and feasibility of correcting)

MAKE-UP WORK ALLOWED

Shanley v. Northeast Ind. Sch. Dist., 462 F.2d 960 (5th Cir. 1972)(speech)

United States v. Wilcox County Bd. of Educ., Civil No. 3934-65-H (S.D. Ala., May 14, 1973)(order providing that "school district shall offer to provide such assistance as is necessary to assure that the suspended or expelled students are able to make up the time and credits lost as a result of the discriminatory discipline.")

R.R. v. Board of Educ. of Shore Regional High Sch. Dist., 263 A.2d 180 (N.D. Super. Ct. 1970) (plaintiff ordered readmitted with tutoring to help him catch up)

NOTICE GIVEN OF THE COURT'S ACTION TO CLASS MEMBERS

Vail v. Board of Educ., 354 F.Supp. 592 (D.N.H.), *remanded for additional relief*, 502 F.2d 1159 (1st Cir. 1973)(also individual notice to students whose records are expunged)

Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972)

TEMPORARY RESTRAINING ORDERS

Wesolek v. Board of Trustees, Civil No. 73-S-101 (N.D. Ind., May 25, 1973)(Clearinghouse Review No. 10,376B)(free speech)

Mello v. School Comm. of New Bedford, Civil No. 72-1146 (D.Mass, Apr. 6, 1972)(free speech)

DeAnza High Sch. Students v. Richmond Unified School Dist., Civil No. C-70-1174 (N.D. Cal., June 4, 1970)

Mt. Eden High School Students v. Hayward Unified Sch. Dist., Civil No. C-70-1173 (N.D. Cal., June 4, 1970)(free speech)

RELIEF PENDING APPEAL GRANTED

Shanley v. Northeast Ind. School Dist., 462 F.2d 960, 967 (5th Cir. 1972)(free speech)

Quarterman v. Byrd, 453 F.2d 54, 56 (4th Cir. 1971)(free speech)

Riseman v. School Comm. of Quincy, 439 F.2d 148, 149 (1st Cir. 1971)(free speech)

COURT-ORDERED RULES OF LITERATURE DISTRIBUTION

In Riseman v. School Comm. of Quincy, 439 F.2d 148, 149 (1st Cir. 1971), the court set forth a rule to govern distribution of literature; it allowed modification by reasonable requirements of time, place and manner (439 F.2d at 149, n.2)

Rowe v. Campbell Union High Sch. Dist., Civil No. 51060 (N.D. Cal., Nov. 10, 1970)(Mem. Op. at 12-13)(system to submit revised regulations to court within 90 days).

In Koppell v. Levine, 347 F.Supp. 456, 460 (E.D.N.Y. 1972), the Court directed the return of materials which had been confiscated improperly.

CONTEMPT OF COURT

In Mills v. Board of Educ. of the District of Columbia, Civil No. 71-1939 (D.D.C. Mar. 27, 1975) the Court cited defendants for contempt upon finding that plaintiffs, handicapped children who were granted an order (dated August 1, 1972) admitting them to public schooling, were still not in school. The Court said, slip op. at 6-7:

> The Court has considered the evidence in the case, and as it has indicated, has taken judicial notice of the course of these proceedings since the decree was first entered, and the Court finds that the Board of Education, members of the Board of Education, the Superintendent of Schools, the Director of the Department of Human Resources and the Mayor, are all in contempt of this Court for their failure to comply with the provisions of the order. This brings us to the question of sanctions.
>
> At this time, in light of the representations that have been made to the Court as to the immediate placement of the members of the class who have brought this motion and as to the immediate processing of the other members who have been identified, the Court will not impose sanctions, but will withhold the question of sanction and will direct that the defendants forthwith place the named plaintiffs in the situations which have been indicated for them at the earliest time that the schools will accept them. The Court will further direct that within ten days the defendants will submit to this Court and to counsel for the plaintiffs, not only this list of 43 children

> that are here, but a list of all children for whom the Department of Special Education, or hearing officers have recommended tuition, or other changes in their education and reveal to this Court the status, including what steps, if any, the defendants have taken to comply with the requirements of the decree. And the Court will further order that once these children have been identified, that they be appropriately placed and that this report to the Court will be made not later than April 15, 1975. Further hearing on the question of the defendants' compliance with their own commitment and with the order of this Court will be set for 10:00 a.m. April 18, 1975 in this court. At that time, the Court will consider whether or not other sanctions should be applied. The Court keeps open the proposition of fines for failure to follow through in the implementation of the order.

Cf. Stacy v. Williams, 312 F.Supp. 742 (N.D.Miss. 1970)(court discusses contempt finding but determines that the responsibility lies with the original three-judge court); see 306 F.Supp. 963 (N.D. Miss. 1969), aff'd, 446 F.2d 1366 (5th Cir. 1971) for prior decision.

ORDERS INSTITUTING STUDENT PARTICIPATION IN DECISION-MAKING

Courts will not require student participation when fashioning relief, but they will approve if if the parties are agreeable. For example, in Nitzberg v. Parks, Civil No. 74-1839 (4th Cir. April 14, 1975) the court suggested, but did not order, that certain questions relating to literature distribution be turned over to a student-faculty committee:

> . . . the disruption and bitterness generated by an unpopular refusal of the administrator to allow circulation of a student publication might thus be alleviated. Through such a joint effort final answers may be found for the many difficult questions precipitated by prior restraint of student publications. For example, such a committee might decide: (1) where on school property it would be appropriate to distribute approved materials; (2) the type of material that might cause distractions and disruptions among the students; and (3) the question of how serious a "disruption" must be before prior restraint would be justified. Such a course would lessen the possibility of arbitrary action and unfair treatment which, in turn, we think would improve teacher-student relations.

The appellate court remanded the matter to the trial court with directions to institute appropriate relief, including an injunction, until school officials arrived at a constitutionally acceptable rule and process for literature distribution. See also the final order in Vail v. Board of Educ., Civil No. 72-178 (D.N.H. 1974)(reproduced at p. 75 supra) which provides that a grievance committee should resolve disputes relating to school rules affecting the distribution of literature. The order stipulates that the committee consist of the school principal, four members of the high school board, and eight students. After the first year, the student representatives are to be the president and vice-president of each class.

VII.

Rights of Students in Private Schools

VII. Rights of Students in Private Schools

The recourse of a student enrolled at a private school to have a dismissal, suspension, or expulsion reviewed by a state or federal court is limited. Whereas many suits involving review of allegedly arbitrary actions of public school administrators have been litigated successfully (see *e.g.*, *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961)), *cert. denied*, 368 U.S. 930 (1962), courts have been very reluctant to review, much less overturn, decisions of private school administrators.

The problem is very serious: although the American educational system has evolved to the point where there is little practical difference in functions, curricula, and goals between public and private institutions of learning, the nation's court system has established two separate codes for judicial review of actions of those institutions. Indeed, the U.S. Court of Appeals, Second Circuit, was forced to hold differently for co-plaintiffs suspended after participating in the same demonstration, because some of the students were enrolled in a state-funded program at the university while the remainder were part of the privately funded program. *Powe v. Miles*, 407 F.2d 73 (2nd Cir. 1968).

An arbitrary expulsion from a school or a discriminatory rejection of college admission are serious occurrences which, if not rectified or even reviewed by the courts, may result in long-term problems for a student. Accountability of a private school to the judicial process would not only benefit the student, but also the institution, since its exercise of authority would become more legitimate.

This article will explore the several theories under which actions have been brought against private institutions. Among those theories are state action and the guarantees of the fourteenth amendment, the contractual nature of the school-student relationship, and common law rights of members of private associations. The logic of these three bases for litigation will be examined, as will their public policy implications and their recognition or rejection by the courts.

THE STATE ACTION THEORY

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Determining the applicability of the amendment, the U.S. Supreme Court has declared that the guarantees are relevant only to "such action as may fairly be said to be that of the States." Shelley v. Kraemer, 334 U.S. 1, 13 (1948). Thus, even before a court will entertain arguments on the merits as to whether there was an absence of due process or equal protection, it is necessary for a party basing his action on the fourteenth amendment to demonstrate the presence of sufficient "state action" in the case or controversy.

An argument based on the state action theory must overcome an additional hurdle: there must be demonstrated a nexus between the state involvement and the challenged activity. Speaking for a Supreme Court majority, Justice Rehnquist asserted that the contact between the private institution and the state must not apply to any activity, "but only with the allegedly discriminatory activity." Moose Lodge v. Irvis, 407 U.S. 163, 175 (1972).

While the Moose Lodge case did not concern an educational institution, proof of the connection is nonetheless necessary to sustain an action against a private school based on the fourteenth amendment. The test has been articulated in Eaton v. Grubbs, 329 F.2d 710, 711 (4th Cir. 1964) (exclusion of black physicians and patients by a hospital may constitute discriminatory state action): the state must be so involved in the conduct of the college "that its activities are also the activities of these governments and performed under their aegis."

In Guillory v. Administrators of Tulane University, 306 F.2d 489 (5th Cir. 1962), the trial court found state action based on the institution's former existence as a public university, the membership on the governing board of state officials, and the tax exempt status enjoyed by the University. Yet the appellate court reversed since there was no sufficient nexus between the evidence of state involvement and the challenged action; the action of the University must be that of the state to mandate review under the fourteenth amendment. The second and tenth circuit courts have expressly concurred with that requirement. See Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969).

Litigating parties have resorted to various arguments to demonstrate the existence of state action. First, the fact that many private institutions receive state aid in the form of tuition grants is said to constitute sufficient state involvement to justify judicial review. In Griffin v. State Board of Education, 239 F.Supp. 560 (E.D. Va. 1965), (challenge to tuition grants to "segregation academies"), the court held that such grants represent sufficient state action if such aid is necessary to the school's existence, so long as there is a direct relationship between the state aid and the school's questioned activity.

Most courts, however, have been hesitant to extend that application beyond cases where the entire institutional budget was supplied by the state. Other possible indicia of state action include operation of the school by state agents, regulation of institutional functioning by the state, and possession of tax exempt status. Courts may view one of these elements as more dispositive than another, but the general approach is to survey an accumulation of indicia to determine a threshold level of state involvement. For most courts, that level is very high.

Indicative of judicial reaction to suits against private institutions is *Furumoto v. Lyman*, 362 F.Supp. 1267 (N.D. Cal. 1973). Neither state granting of tax exempt status nor the power of eminent domain nor the approval of criteria for awarding degrees is evidence of state control, the court asserted. State action entails either state control of the university or direct state involvement in the particular activity challenged. Even when a school's grading and examination system is based upon state requirements, there may not necessarily be state action. *Grafton v. Brooklyn Law Sch.*, 478 F.2d 1137 (2d Cir. 1973) (dismissal of student by law school does not constitute state action.) See also, *Torres v. Puerto Rico Jr. Col.*, 298 F.Supp. 458 (D. Puerto Rico 1969) (no state action despite junior college's receipt of grants from federal government and Commonwealth of Puerto Rico); *Pendrell v. Chatham Col.*, 370 F.Supp. 494 (W.D. Pa. 1974) (discharged professor failed to demonstrate state action by a private college).

The relatively few cases in which courts did overturn private institutions' actions involved schools which, although nominally private, had strong governmental connections. In *Brown v. Strickler*, 422 F.2d 1000 (6th Cir. 1970), for example, the court was convinced that the University of Louisville was a municipal university and that it derived substantial support from the city and state. Where an institution was originally public and continued to be supervised by the state legislature and state agencies, state action was also found. *Pennsylvania v. Brown*, 270 F.Supp. 782 (E.D.Pa. 1967), *cert. denied*, 391 U.S. 921 (1968) (Girard College). Similarly, the court in *Doe v. Hackler*, 316 F.Supp. 1144 (D.N.H. 1970), found sufficient state action since the private academy had contracted with the district school board, and under New Hampshire law, any such contract makes that school public. See also *Braden v. University of Pittsburgh*, 477 F.2d 1, 6-8 (3rd Cir. 1973) (remanding dismissed complaint with directions to hear complaint of professor alleging sex discrimination). The appellate court directed the trial court to gather evidence on the amount of general fund state support received by the university. *Id.* at 8.

Courts have been even more willing to find state action where racial discrimination is alleged. In *Spark v. Catholic Univ. of America*, 510 F.2d 1277, 1281-82 (D.C. Cir. 1975), the court spoke as follows:

> [A]t least where the question of race is not involved, it is necessary to show that the Government exercises some form of control over the actions of a private party.

In *Coleman v. Wagner Col.*, 429 F.2d 1120 (2d Cir. 1970), the second circuit remanded the trial court's rejection of plaintiffs' challenge to expulsions. There the state had intervened by passing a statute which might have coerced the college into adopting hardline actions against student demonstrators. See, also, *Hammond v. University of Tampa*, 344 F.2d 951 (5th Cir. 1965) (establishment of university made possible by use of surplus city building and other city land), and *Ryan v. Hofstra*, 67 Misc.2d 651, 324 N.Y.S.2d 964 (Sup. Ct. 1971) (university buildings leased from state, tax exempt status, state scholarships, reservation by state to make rules for operation of facilities), cases involving numerous indicia of state involvement. See also, *Ryan*, *advisory memo.*, 68 Misc. 890, 328 N.Y.S.2d 339 (1972).

Statutory incorporation of a university into the states' educational system, substantial representation by Pennsylvania on the university's board of trustees, and massive financial studies comprised sufficient state action to permit judicial review of the termination of employment of plaintiff-faculty members. *Isaacs v. Board of Trustees of Temple Univ.*, 385 F.Supp. 473 (E.D.Pa., 1974). Because many private institutions maintain far fewer ties with the state than the cases noted above, it is often incumbent upon parties seeking judicial review of actions of such schools to resort to the "public function" approach. Under this more imaginative theory, plaintiff alleges state action by pointing to the public function served by private education.

Evans v. Newton, 382 U.S. 296 (1966), is a landmark case in which the Supreme Court found state action in the bequest of land for a park for white persons only, since a park serves a public function. Presumably, a school or university serves a public function, too. Yet the Supreme Court refused to indicate this, and instead issued the following weak dictum in the *Evans* opinion, *id.* at 300:

> If a testator wanted to leave a school or center for the use of one race only, and in no way implicated the State in the supervision, control, or management of that facility, we assume *arguendo* that no constitutional difficulty would be encountered.

Several federal courts have adopted the public function approach in the educational realm, however. In *Belk v. Chancellor of Washington Univ.*, 336 F.Supp. 45 (E.D. Mo. 1970), students sued to compel the chancellor to prevent class disruptions. According to the court, education is a matter of great public concern and interest, *id.* at 48:

> It is the opinion of this court that the acts of a private university can constitute "state action" when said university is denying to its students their right to participate in the educational process. Education is a public function.

Presumably, although not necessarily, the court would have reasoned as such had the plaintiffs been the disrupting agents who sought reinstatement following expulsion.

In *Buckton v. National Collegiate Athletic Association*, 366 F.Supp. 1152 (D.Mass. 1973), plaintiffs sought injunctive relief after being ruled ineligible to play hockey both by Boston University and the NCAA. Fundamental to the court's favorable holding for the students was its assertion that the university, despite being private, performed a governmental function and could, therefore, be constrained by the court. See *Brown v. Strickler*, 422 F.2d 1000 (6th Cir. 1970) (University of Louisville), where that court also accepted the public function argument. Other courts, however, have rejected the public function theory as applied to private education. See, e.g., Pendrell v. Chatham Col., 370 F.Supp. 494 (W.D.Pa. 1974); Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971).

An argument could be made that private elementary and secondary schools, more so than universities, do perform a public function since that level of education is compulsory, and the state implicates itself in the child's schooling by requiring attendance until a certain age. Moreover, one could argue that, practically, given the proliferation of students seeking college degrees, private universities, too, are performing a function which would otherwise be performed by the state. Government takeovers and transformations of failing private colleges into public universities is evidence of that point.

Nonetheless, most courts have refused to adopt this theory, even with respect to secondary schools. Bright v. Isenbarger, 445 F.2d 412 (7th Cir. 1971), involved a challenge to an expulsion from a parochial high school. Although an Indiana statute makes education compulsory between ages 7-17, and despite the fact that a state law promulgates curricula requirements affecting private schools, the Seventh Circuit affirmed the district court holding that the relationship between the parochial school and the state "falls far short of that which would be required to constitute 'significant involvement.'" 314 F.Supp. at 1397. The court flatly rejected plaintiffs' public function argument.

Yet viewed from a different perspective, there is no compelling logical distinction between a university community and a Chickasaw, Alabama. The latter community was the subject of the Supreme Court opinion in Marsh v. Alabama, 326 U.S. 501 (1946). There the Court held that a stranger (a Jehovah's witness) retained free-speech rights in a company-owned town and that he could distribute literature on company-owned streets notwithstanding trespass laws. Just as Chickasaw performed functions normally carried out by a municipality or state, so, too, do many college communities, which possess their own security forces, power plants, and community codes. See also Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968) (permitting peaceful picketing of a store in a shopping center which served as a community business block).

Notwithstanding the reluctance of most courts to recognize the state action theory, several problems remain with respect to the Fourteenth Amendment argument. On the one hand, we may wish to broaden the concept of state action so that it may be applied to more private schools. On the other hand, we would probably wish to preserve the diversity and independence of private education. (See Developments in the Law--Academic Freedom, 81 HARV. L. REV. 1945 (1968).) This was the view of Judge Hotzoff in Greene v. Howard Univ., 271 F.Supp. 609, 613 (D.D.C. 1967). However, student plaintiffs received interlocutory relief pending appeal and their case was thereby mooted (as they remained in school) and teacher plaintiffs prevailed on appeal. 412 F.2d 1128 (D.C. Cir. 1969).

We would hope to maintain a diverse and pluralistic society in which individuals could opt for institutions in the private sector if they so desired, 81 HARV. L. REV. at 1064:

> With respect to ideology, religion, wealth, and intelligence, but not with respect to race, our society has judged that there is value in the richness of disparate traditions.

To be sure, nothing in the fourteenth amendment necessarily threatens the existence of a Catholic parochial school or an all women's university. Nonetheless, once we open the door to allow judicial review of suspensions based on the state action theory, we might be inviting an overly aggressive court to interfere excessively with the private sector. Students enrolled at private institutions deserve the equal protection and due process which their counterparts at public schools receive; yet perhaps these rights might be better attained under the color of another theory rather than under state action.

Other cases not discussed where state action was found: Rackin v. University of Pennsylvania, 386 F.Supp. 992 (E.D.Pa. 1974) (claim of discrimination on the basis of sex where court found state action).

Other cases not discussed where state action was not found: Greenja v. George Washington Univ., 512 F.2d 556 (D.C. Cir. 1975) (lack of evidence showing governmental role in the management of the university); Brownley v. Gettysburg Col. 338 F.Supp. 725 (M.D. Pa. 1972) (refusal of a private college to reappoint nontenured teacher did not constitute state action); Grossner v. Trustees of Columbia Univ.,287 F.Supp. 535 (S.D.N.Y. 1968) (lack of state involvement in disciplinary proceedings of students occupying school buildings.)

THE CONTRACT THEORY

While courts prefer to defer to school officials' judgments in educational affairs, they do recognize that because of the school-student "contract," schools do owe students some amount of fairness in their dealings. Schools may exercise their discretion, but cannot act arbitrarily, capriciously, or maliciously towards students without breaching their contract. Courts usually define arbitrariness as the presence of one, or both, of two elements: either the disciplining body lacked jurisdiction or it did not act in good faith.

For his part, the student impliedly agrees, upon matriculation, to the rules and regulations of the institution. John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924). The student should not act to the detriment of the school, and he should obey the school's established customs. Koblitz v. Western Reserve Univ., 11 Ohio Cir. Dec. 515, 21 Ohio Cir. Ct. R. 144 (1901).

The power to suspend or expel is conceded to be an attribute of educational institutions. Goldstein v. New York Univ., 76 App.Div. 80, 78 N.Y.S. 739 (1902). Yet in return for the student's tuition, the school is contractually obligated to allow continued attendance so long as the student remains in good standing. Booker v. Grand Rapids Medical Col., 156 Mich. 95, 120 N.W. 589 (1909). The school impliedly contracts not only to permit attendance, but to allow a student to earn a degree. In re Carr v. St. John's Univ., 17 App.Div.2d 632, 231 N.Y.S.2d 410, 413, aff'd, 12 N.Y.2d 802, 235 N.Y.S.2d. 834 (1962).

For the exact terms of the contract, courts usually cite the school's published catalogues, bulletins, circulars, and regulations in effect at the time the student first matriculates at the school. Zumbrun v. University of Southern California, 25 Cal.App.3d 1, 101 Cal.Rptr. 499 (Ct. App. 1972). Parenthetically, it should be noted that several courts have articulated an estoppel theory which allows a student to rely on a school official's approval of a practice contrary to officially published school policy. Healy v. Larsson, 67 Misc.2d 374, 323 N.Y.S.2d 625 (Sup. Ct. 1971), aff'd, 348 N.Y.S.2d 71 (1973).

While it may be argued that the rule of "judicial nonintervention" makes some sense in academic matters, as long as the school is not acting arbitrarily, capriciously, or in bad faith, "judicial nonintervention" has little validity in disciplinary matters. This seems particularly true since Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930 (1962), established that these types of issues are subject to judicial review if the student happens to be in a state-supported school. Courts should recognize that just as the public school student does not leave his constitutional rights at the schoolhouse door, the private school student does not contract to waive his right to fundamental fairness by enrolling in private school.

The major problem for students seeking to argue contractual rights against their school might be termed "the reservation clause." In Anthony v. Syracuse Univ., 224 App.Div. 487, 231 N.Y.S. 435 (1928), plaintiff signed a waiver, upon matriculation, giving the school the right to demand the student's withdrawal at any time, for whatever reason. Anthony was dismissed during her senior year, based on rumors that she was "not a typical Syracuse girl." Although the trial court ruled in her favor, the appellate court reversed, upholding the school's right to establish conditions on the student's acceptance.

Since 1928, courts have followed the Anthony precedent. In Robinson v. University of Miami, 100 So.2d 442 (Fla. Dist.Ct. App.), cert. denied, 104 S.2d 595 (1958), the court upheld dismissal based on a clause in the school bulletin by which the university reserved "the right to ask a student to withdraw at any time." See also, Dehaan v. Brandeis Univ., 150 F.Supp. 626 (D.Mass. 1957).

For students arguing against schools using such broad reservation clauses, often the biggest problem is to convince the court to hear their case at all. Courts frequently extol the rule of "judicial non-intervention in scholastic affairs" and warn of the danger of substituting their judgment for that of school officials.

That type of judicial attitude is unfortunate. While courts have demonstrated a willingness to nullify other exploitative contracts, there seems to be a blind acceptance of the freedom of contract model when school-student agreements are at issue. Just as in other situations involving contract law, a student should be able to claim that certain clauses should be voided because of their vagueness or because they are contrary to public policy. Moreover, because the student has virtually no opportunity to negotiate with the school, the doctrines of adhesion contracts should apply.

One law review has remarked as follows, Private Government on the Campus -- Judicial Review of Student Expulsions, 72 YALE L.J. 1362, 1279 (1963):

> [S]trict construction against the university, and insistence upon proof of actual notice to the student of inequitable terms, would seem to be dictated by the doctrines of contracts of adhesion; further protection against "unconscionable" or "unreasonable" terms might be achieved through a refusal to enforce, on public policy grounds.

That article also spoke of the disparity in bargaining power between school and student, id. at 1378:

> Modern courts, resting on similar disparities, have taken a far more restrictive attitude toward the binding force of such "contracts" in other areas.

Similar to the state action theory, the contract theory has not attained widespread judicial acceptance in the area of school-student relations. It is a legally sound theory, nonetheless, and unlike the state action theory, it does not invite rampant court interference in the private domain. Although the contract theory has been criticized on the ground that it imposes an artificial framework on the school-student relationship, the reality remains that there exist express and implied rights and corresponding duties between these parties. The courts have recognized these rights and duties, but they cannot continue to be oblivious to procedurally and substantively unconscionable situations in which students are forced to waive their rights and accept additional duties.

THE COMMON LAW RIGHTS THEORY

Under the English common law tradition, members of private associations were protected against expulsions which were contrary to "natural justice." Courts would overturn an expulsion if the association had been motivated by malice or if the act was ultra vires. Dawkins v. Antrobus, 17 Ch.D. 615 (C.A. 1881). The Dawkins court articulated the requirements of notice and an opportunity to be heard, the absence of either requirement implying that the expulsion was contrary to natural justice.

"Due process is the American analogue of natural justice." Comment, Common Law Rights for Private University Students: Beyond the State Action Principle, 84 YALE L.J. 120, 133. American courts have adhered to the English precedent of refusing to review the expulsion on its merits, but the U.S. courts have adopted the procedural requirements of notice and an opportunity to be heard. In Loubat v. LeRoy, 40 Hun. (47 N.Y.Sup.Ct.) 546, 17 Abb. N. Cas. 512 (1886), a New York court reviewed an allegedly arbitrary action taken by an incorporated association, id. at 551-52:

> The legal principle is a general one affecting all proceedings which may result in loss of property, position or character, or any disaster to another; that he shall be first heard by the board or tribunal considering his case before that body will be legally permitted to pronounce his condemnation.

There is no logical reason why such common law principles should not apply to private universities as well as other private associations. Similar to those associations, schools have powers normally reserved to the state. Just as employees or labor union members have substantial interests at stake when confronted by the threat of expulsion, so, too, do students. An education and the concommitant educational degree are sources of great social and economic potential for the individual student. The status of student is a property interest worth protecting because it is "deemed inherently worthwhile to the prevailing social ethic." (See 84 YALE L.J. 120, 125-132.) Wrongful expulsion is an invasion of that property interest, and a student should be able to bring a tort action against the school when such an incident takes place. One could even argue that unlike other private associations, schools are relatively immune to market pressures because of the lack of mobility of students once they matriculate.

Under this analysis, the school has its own interests, similar to the contract analysis. The institution possesses the rights to manage its own affairs and to pursue its own goals. Following the property analysis, the student's rights may be said to be defeasible upon proof of conduct inconsistent with the school's rights. 84 YALE L.J. 120, 146.

The common law basis for litigation challenging the actions of private schools is potentially the most desirable of the three theories discussed in this article. It avoids the shortcomings of the state action theory by being applicable to all students, no matter how private or independent the institution they attend; the threat of excessive state intervention is also mitigated. While the contract theory offers some hope to the student, its success depends largely upon the courts' preference of public policy over the freedom of contract model. The common law rights theory seeks to establish rights and obligations based on status, irrespective of contractual agreements.

The major problem with the common law theory, of course, is that with respect to the school-student relationship, it has not been litigated often enough to predict the reaction of future court decisions. Yet there is no compelling reason why courts should reject the common law rights doctrine. A student seeking to attain judicial review of an expulsion is best advised to present his case along all three theories discussed in this article, hoping that the court will recognize the legal validity of at least one.

Lawrence G. Green
Center for Law and Education
August 1975

Drawing by Aaron Pressman

Model Pleadings

Model Pleading No. 1

Pleading Alleging Violation of Freedom of Expression: Literature Distribution

Plaintiffs v. Defendants, individually and in their official capacities.	)))))))))	Civil Action No. ________

COMPLAINT

1. This is a civil class action to secure and protect the rights of public school students, under the First and Fourteenth Amendments to the United States Constitution, to: (a) distribute in school and on school grounds leaflets and other printed material expressing views on political and other matters of public concern; and (b) due process of law in school suspension procedures (which affect the right to continue an education uninterrupted).

2. This action arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1343. The court is empowered to grant declaratory relief by 28 U.S.C. Sections 2201 and 2202.

3 (a). The plaintiff ______________________________ is a student at ________________ ____________, in the _______ grade, and resides at ____________________________________.

3 (b-z). [same format for other plaintiffs].

4. Plaintiffs bring this action individually and on behalf of all other similarly situated students enrolled at ______________________________ [name of defendant school]. The members of the class are too numerous to be named and brought before this court as plaintiffs. There are questions of law and fact common to the class. The claims of the named plaintiffs are typical of the claims of the class and the named plaintiffs will fairly represent the interests of all members of the class. The defendants have acted and failed to act on grounds generally applicable to the class.

5 (a). [identification of Defendant(s)]. The defendant, ___________________________, who is sued individually and in his/her official capacity, is a member of the school board of ____.

5 (b-z). [Same format for other defendants].

6 (a-z). [Set forth the other pertinent facts.]

7. By the acts and practices set forth in this complaint, the defendants and their predecessors, employees and agents have denied to plaintiffs, and the class of students plaintiffs represent, rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983, in numerous ways including the following:

(a) punishing and threatening to punish students for exercising the constitutional rights to freedom of speech and of the press;

(b) engaging in conduct having the effect of chilling the exercise of the constitutional rights to freedom of speech and of the press;

(c) refusing to permit distribution of leaflets and newspapers based in part on an advance review of the content of such documents, thereby denying the constitutional rights to freedom of speech and of the press;

(d) denying the right of students to receive written materials from other persons, thereby denying the full benefits inherent in freedom of speech and press;

(e) suspending students from school, substantially interfering with their education and stigmatizing them, without a prior hearing, thereby denying due process of law;

(f) substantially interfering with the education of some students while affording an education to other students, without a compelling governmental interest in justifying the classification, thereby denying the equal protection of the laws.

8. Unless enjoined by this Court, the defendants will continue to engage in practices the same as or similar to those alleged in this complaint, thereby irreparably injuring plaintiffs and the class of students which plaintiffs represent.

WHEREFORE, plaintiffs on behalf of themselves and the class of persons they represent pray that this Court:

1. Order that this action be maintained as a class action pursuant to Rule 23, of the Federal Rules of Civil Procedure.

2. Enter a declaratory judgment that the acts and practices set forth in this complaint deny to plaintiffs and the class of persons plaintiffs represent rights under the First and Fourteenth Amendments to the United States Constitution.

3. Preliminarily and permanently enjoin the defendants, their agents, employees, successors and all persons in active concert or participation with them from:

(a) suspending, punishing, harassing or threatening students for distributing or receiving, or taking steps to distribute or receive leaflets, newspapers or other written materials in an orderly and not substantially disruptive manner on the grounds of or within schools in the ______________________ [school system];

(b) interfering with the right of students to freedom of speech and of the press, and particularly, to distribute (and to receive from other students) leaflets, newspapers or other written materials in an orderly and not substantially disruptive manner on the grounds of schools in the ______________________[school system];

(c) requiring or undertaking advance approval of the content of any such materials;

(d) suspending or expelling any student, or placing information regarding the suspension or expulsion of any student on any school record, until:

(i) the adoption of rules (formulated so as to allow participation of representatives of plaintiffs) setting forth in detail the bases for suspending and expelling students and the sanction for each violation of the rules; provided that these rules shall contain no arbitrary or irrational sanctions; and

(ii) the adoption of rules (formulated so as to allow participation of representatives of plaintiffs) setting forth in detail the procedures to be employed when the administration seeks to suspend or expel a student; provided that these rules shall, at a minimum, provide for (1) prior notice of the charges and the witnesses and evidence to be relied upon by the administration; (2) a hearing where each side may present evidence, the hearing to be prior to the suspension or expulsion unless there are emergency circumstances; (3) the right of the student to be represented by an attorney or other advocate of his or her choice; (4) the right of cross-examination of witnesses; and (5) a decision by an impartial person solely upon the evidence introduced at the hearing; and

(iii) approval by the Court of any rules as specified in paragraphs (i) and (ii) to all students of the system and the posting of the rules in a conspicuous place in each classroom.

4. Require in preliminary and permanent injunctions that defendants, their agents and employees take the following actions:

(a) notify all students of their right to distribute and receive leaflets, newspapers and other written materials in an orderly and not substantially disruptive manner on the grounds of or within ______________________________ [schools];

(b) expunge from the school records of the plaintiffs and all other persons similarly situated mention of any illegal disciplinary actions taken against them and the bases for such actions;

(c) expunge from the school records of the plaintiffs and all other persons similarly situated any zeroes or other penalties imposed as a result of any illegal disciplinary actions taken against them, furnish plaintiffs remedial help (if requested following adequate notice) covering work missed during periods of suspension, allow plaintiffs to make up work missed during periods of suspension and make appropriate adjustments to grades;

(d) allow students and their parents to inspect all records, including the students' permanent records, necessary to insure that there has been compliance with paragraphs 4(b) and (c).

5. Grant such other and further relief as the needs of justice may require.

This model was adapted from the complaint in Vail v. Board of Educ. of Portsmouth Sch. Dist., 354 F.Supp. 592 (D.N.H.), informally approved but remanded for additional relief, 502 F.2d 1159 (1st Cir. 1973)

Model Pleading No. 2

Pleading Alleging Violation of Freedom of Expression: Symbolic Expression

1. This is a civil class action to secure and protect the rights of students at ____________ ________________________ [name of defendant school], under the First and Fourteenth Amendments to the United States Constitution, to: (a) peacefully display symbols representing their points of view on the issue of ____________________________________ or any other issue with which students are concerned; and (b) due process of law in school suspension procedures (which affect the right to continue an education uninterrupted).

2-6. [Same as paragraphs 2-6 in Model No. 1, pp. 375-76, supra]

7. By the acts set forth in this complaint, the defendant and their predecessors, employees and agents have denied to plaintiffs, and the class of students plaintiff represent, rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983, in numerous ways, including the following:

(a) punishing and threatening to punish students for exercising the constitutional right to express themselves;

(b) engaging in conduct having the effect of chilling the exercise of the constitutional rights to freedom of speech;

(c) refusing to permit plaintiffs to peacefully display symbols representing their points of view on any issue, so long as the display creates no substantial disruption of normal school operations;

(d) suspending students from school, substantially interfering with their education and stigmatizing them, without a prior hearing, thereby denying due process of law.

8. [Same as paragraph 8 in Model No. 1, p. 376, supra]

WHEREFORE, plaintiffs on behalf of themselves and the class of persons they represent pray that this Court:

1-2. [Same as wherefore clause, paragraphs 1-2 in Model No. 1, p. 377, supra]

3. Preliminary and permanently enjoin the defendants, their agents, employees, successors and all persons in active concert of participation with them from:

(a) suspending, punishing, harrassing or threatening students for wearing or displaying symbols of their views in an orderly and not substantially disruptive manner on the grounds of or within the schools of the ______________________________ [school system];

(b) interfering with the right of students to freedom of speech, including symbolic speech, and, particularly, to wear [armbands, buttons or whatever is at issue], in an orderly and not substantially disruptive manner on the grounds of or within the schools of the ______________________________ [school system];

(c) requiring or undertaking advance approval of the wearing or display of symbols expressing a point of view;

(d) [Same as wherefore clause, paragraph 3(d) in Model No. 1, p. 377, supra]

4. Require in preliminary and permanent injunctions that defendants, their agents and employees take the following actions:

(a) notify all students of their right to wear or display symbols expressing a point of view in an orderly and not substantially disruptive manner on the grounds of or within the schools of the ______________________________ [school system];

(b)-(d) [Same as wherefore clause, paragraphs 4(b)-(d) in Model No. 1, p. 378, supra]

5. Grant such other and further relief as the needs of justice may require.

Model Pleading No. 3

Pleading Alleging Violation of Right to Hear Speakers

1. This is a civil class action to secure and protect the rights of students at ______________ ____________________________________ [name of defendant school], under the First and Fourteenth Amendment to the United States Constitution, to: (a) invite and hear speakers of their choice on the campus of said school; (b) select speakers for appearances on campus without prior restraint or any restraint based upon the unpopularity of the views of the speaker, or any other reasons relating to the content of the speech; (c) due process of law in the administration of the rules governing the invitation of speakers on campus at said school.

2-5. [Same as paragraphs 2-5 in Model No. 1, p. 375, supra]

6. [if applicable] All of said plaintiffs are members of ______________________________ [name of sponsoring organization, if there is one], an [incorporated/unincorporated] association composed of student members attending ____________________________ [name of defendant school] and duly recognized as a campus organization by said school.

7. Acting in accordance with defendant's regulations pertaining to rules under which off-campus speakers are invited to speak, plaintiffs ________________________, ____________________ and ________________________ [acting through the organization __________________________] requested permission to invite and hear a speaker, ______________________________ [name], on __________________ [date], at ______________________________ [name of school]. A copy of this request is attached hereto as Exhibit "A", and made a part of this complaint. On ________ [date] defendant ________________________ [name] acting on behalf of ____________________ [school] formally denied said request. The disapproval is attached as Exhibit "B" and made a part of this complaint.

8. The proposed speech by ______________________________ [name of speaker] would in no way constitute a clear and present danger of substantial harm to the orderly operation of the ________ __________________ [name of defendant school]. There is no reason to believe under all of the facts and circumstances herein that during the course of said speech ______________________ [name of speaker] would advocate such actions as 1) the violent overthrow of the Government of the United States, the State of __________________, or any political subdivision thereof; or 2) the willfull damage or destruction, or seizure or subversion of the institution's buildings or other property; or 3) the forceable disruption or impairment of, or interference with, the institution's regularly scheduled classes or other educational function; or 4) the physical harm, coercion, intimidation, or other invasion of lawful rights of the institutions officials, faculty members or students; or 5) any other material disruption on the campus.

9. [Set forth the other pertinent facts.]

10. By the acts and practices set forth in this complaint, the defendants and their predecessors, employees and agents have denied to plaintiffs and the class of students plaintiffs represent, rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983, in numerous ways, including the following:

(a) refusing to permit ____________________ [name of speaker] to exercise his/her constitutional right to free expression by refusing to permit him/her to appear on campus to speak to students;

(b) preventing student plaintiffs from enjoying their constitutional right to hear the views of the speaker, ________________________________ [name of speaker];

(c) engaging in conduct having the effect of chilling the exercise of the constitutional rights to speak and to hear the speech of others;

(d) denying equal protection to the speaker, ________________________ [name] by refusing to permit him/her to appear on campus and speak while permitting numerous other persons this right;

(e) denying equal protection to the organization desiring to sponsor the speaker, ___________________________________ [name of organization], by permitting other campus organizations to invite and hear speakers without restriction while barring this organization's choice of speakers;

(f) applying an unconstitutional system of prior restraint upon the contemplated speech of _________________________________ [name of speaker].

11. Unless enjoined by this Court, the defendants will continue to engage in practices the same as or similar to those alleged in this complaint, thereby irreparably injuring plaintiffs and the class of students and speakers which plaintiffs represent.

WHEREFORE, plaintiffs on behalf of themselves and the class of persons the represent pray that this Court:

1. Order that this action be maintained as a class action pursuant to Rule 23, Federal Rules of Civil Procedure.

2. Enter a declaratory judgment that the acts and practices set forth in this complaint deny to plaintiffs and the class of persons plaintiffs represent rights under the First and Fourteenth Amendments to the United States Constitution.

3. Preliminarily and permanently enjoin the defendants, their agents, employees, successors and all persons in active concert or participation with them from:

(a) refusing to permit ______________________________ [name of speaker] to exercise his/her constitutional right to free expression by refusing to permit him/her to appear on campus to speak to students;

(b) preventing student plaintiffs from enjoying their constitutional right to hear the views of the speaker, ___________________________________ [name of speaker];

(c) engaging in conduct having the effect of chilling the exercise of the constitutional rights to speak and to hear the speech of others;

(d) denying equal protection to the speaker, ____________________________ [name] by refusing to permit him/her to appear on campus and speak while permitting numerous other persons this right.

(e) denying equal protection to the organization desiring to sponsor the speaker, _____________________________________ [name of organization], by permitting other campus organizations to invite and hear speakers without restriction while barring this organization's choice of speakers;

(f) applying an unconstitutional system of prior restraint upon the contemplated speech of _______________________________ [name of speaker];

(g) refusing to permit other speakers to appear and speak on campus at the invitation of plaintiffs or the class of persons they represent where the refusal is based upon disagreement with the views of the speaker or organization sponsoring the speaker.

4. Issue a temporary restraining order, preliminary injunction and permanent injunction directing the Defendants individually and in their official capacity, and their agents, servants, employees and all other persons acting in concert with Defendants, to permit the invitation of ____________________________________ [name of speaker] to appear on campus and speak at the invitation of plaintiffs, and permit plaintiffs and any other persons as may desire to attend and hear the views of _____________________________________ [name of speaker].

5. Issue a permanent injunction directing that Defendants, individually and in their official capacities, their agents, servants, employees, and all persons acting in concert with them, be prohibited from any further interference with the rights of students at ______________________ [defendant school] to peacefully assemble and hear speeches made by speakers of their choice, provided that suitable campus facilities are available for such purposes on the date that the assembly may be scheduled and provided that reasonable notice of such assembly shall be given to the administrative officials of the school in order that adequate security and janitorial tasks may be accomplished.

6. Establish procedural guidelines for the operation of the rules under which student organizations and individual students may request permission to invite and hear speakers of their choice on campus, to insure that the rights of Plaintiffs and others similarly situated shall be fully protected and that due process shall be followed in the administration of these rules.

7. Grant such other and further relief as the needs of justice may require.

This model was adapted from the complaint in Molpus v. Fortune, 311 F.Supp. 240 (N. D.Miss. 1970), aff'd, 432 F.2d 916 (5th Cir. 1970) (Clearinghouse No. 16,924).

Model Pleading No. 4

Pleading Alleging Violation of Freedom of Right of Organization to Recognition

1. This is a civil class action to secure and protect the rights of students at ____ [name of defendant school], under the First and Fourteenth Amendments to the United States Constitution, to: (a) freely join together in association with each other, and to establish formal organizations receiving the same status, privileges and recognition from ____________________________________ [defendant school] as do other student organizations; (b) to receive such status, privileges and recognition without regard to the unpopularity of views of the individual members or of the organization which they have formed; (c) due process of law in the administration of rules setting forth the status, privileges and recognition of student organizations on campus.

2-6. [Same as paragraphs 2-6 in Model No. 1 , pp. 375-76, supra]

7. By the acts set forth in this complaint, the defendant and their predecessors, employees and agents have denied to plaintiffs, and the class of students plaintiff represent, rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. 1983, in numerous ways, including the following:

(a) denying plaintiffs the right to associate with each other in a formal organization enjoying the same status, privileges and recognition as are accorded other student organizations on defendant's campus;
(b) engaging in conduct having the effect of chilling the exercise of the constitutional rights to freedom of speech and assembly;
(c) discriminating against plaintiffs' organization because of disagreement with the views of plaintiffs, other members and the organization itself;
(d) denying plaintiffs these rights and privileges without due process of law.

8. [Same as paragraph 8 in Model No. 1, p. 376, supra]

WHEREFORE, plaintiffs on behalf of themselves and the class of persons they represent pray that this Court:

1. Order that this action be maintained as a class action pursuant to Rule 23, Federal Rules of Civil Procedure.

2. Enter a declaratory judgment that the acts and practices set forth in this complaint deny to plaintiffs and the class of persons plaintiffs represent rights under the First and Fourteenth Amendments to the United States Constitution.

3. Preliminarily and permanently enjoin the defendants, their agents, employees, successors and all persons in active concert or participation with them from:

(a) refusing to permit plaintiffs to exercise constitutional rights to free expression and assembly by refusing to give plaintiffs' organization the same status, privileges and recognition as is given to other students' organizations on defendant's campus;
(b) engaging in conduct having the effect of chilling the exercise of the constitutional rights to expression and to assembly for students generally at ______________________ ______________________________ [name of defendant school];
(c) discriminating against plaintiffs' organization because of disagreement with the views of plaintiffs, other members and the organization itself;
(d) denying plaintiffs their rights of expression and assembly without due process of law in the administration of the rules regulating campus organizations.

4. Grant such other and further relief as the needs of justice may require.

Model Pleading No. 5

Pleading Alleging Statute (or Rule) Unconstitutionally Vague and Overbroad

1-8 (a)-(h). [These paragraphs may follow the appropriate model above, depending on the substantive rights which are impeded in the overbroad statute or rule. The numbering and language here corresponds with Model No. 1. If a statute is challenged, it may be necessary for the complaint to request that a three-judge court be convened. See paragraph 3, Model No. 10, p. 404, infra.]

8(g). enforcing ______________________________ [citation to statute or rule], which is invalid on its face and as applied as including both speech and other activities which are protected under the First Amendment as well as that which may be lawfully regulated by defendant school. A copy of ______________________ [statute or rule] is attached as Exhibit "A" and made a part of this complaint.

or [optional provision]

8(g). enforcing ______________________________ [citation to statute or rule], which is too vague and indefinite to fairly inform students of the instances in which they will be subject to suspension, and which is overly broad in its application to students wishing __________ ____________________________ [state protected activity students wish to pursue, e.g. "peacefully to distribute literature in the schools."]. A copy of ______________________ [statute or rule] is attached as Exhibit "A" and made a part of this complaint.

[The same language can be added to paragraph 7 of the WHEREFORE clause of Model No. 1; or the comparable paragraph of other models.]

adapted from the complaint in Mello v. School Comm. of New Bedford, Civil No. 72-1146 (D.Mass. Apr. 6, 1972) (temporary restraining order) (case settled thereafter)

Model Pleading No. 6

Pleading Alleging Violation of Right to Privacy: Search and Seizure

Plaintiffs v. Defendants, individually and in their official capacity	)	Civil Action No. ________

COMPLAINT

1. This is a civil class action to secure and protect the rights of the plaintiff under the Fourth and Fourteenth Amendments to the United States Constitution: (a) to be free from searches of their persons or personal space by school officials without probably cause for such a search, (b) to be free from searches of the lockers assigned to him for his personal use by school officials without probable cause for such a search, (c) to have safeguards in school disciplinary procedures which insure their fairness.

2. In addition, this is a suit on behalf of individual plaintiffs ________________, ________________ and ________________ [names], to enjoin their unlawful expulsion [or suspension of _____ days] from ________________ [defendant school] and to obtain reinstatement as students therein.

3-6. [Same as 2-6 in Model No. 1, p. 375, supra]

7. [Set forth the time, date, and other details of the search.]

8. The defendants, ________________________________ [names] acting under color of their authority as administrators for the defendant school board approved and authorized said search prior to its execution.

9. The said search was made without either a warrant or probable cause and was undertaken without permission from the plaintiffs, thus making it unreasonable and in violation of the Fourth and Fourteenth Amendments.

10. School board regulation ________, a copy of which is attached as Exhibit "A", and made a part of this complaint, authorizes a search without either a warrant, probable cause or permission of those being searched, and therefore violates plaintiffs' rights under the Fourth and Fourteenth Amendments.

11. As a result of said search and based upon certain quantities of marijuana discovered in plaintiffs' locker [and/or upon their persons] in the course of the search, defendants brought charges against plaintiffs for violation of school board rule ________ regarding the possession of marijuana, a copy of which is attached as Exhibit "B", and made a part of this complaint.

12. As a result of the discovery of said marijuana defendant ______________________________ [name of school official] ordered plaintiff expelled from school for the remainder of the school year.

13. [Facts of due process allegations. See Model Complaint No. 10, pp. 404-11, infra]

14. Plaintiffs contend that the facts alleged herein prove that defendants, acting under color of state law, have expelled him from high school by illegal and unconstitutional means as follows:

(a) The school board regulation authorizing a search without a warrant, probable cause or consent is a violation of the Fourth and Fourteenth Amendments.
(b) The search described in paragraph(s) 5-8 violated plaintiffs rights under the Fourth and Fourteenth Amendments.
(c) Plaintiffs were found guilty of violating school board rules against possession of marijuana based solely upon evidence obtained as a result of the violation of his Fourth and Fourteenth Amendment rights described herein.
(d) Plaintiffs were denied their fundamental procedural due process rights by being found guilty of possession of marijuana and suspended from school without being afforded:

(1)-(5) [Set forth infirmities in procedural system. See Model Complaint No. 10]

15. If the relief prayed for is not granted plaintiffs will be irreparably injured in that they will be expelled from high school for the remainder of the school year, will be subjected to public humiliation and embarrassment, will lose credit for work completed during the current school year, and will have their chances for entrance to college and future employment opportunities reduced.

WHEREFORE plaintiffs pray that this Court:

1. Enter declaratory judgment that the search undertaken by defendants is illegal and unconstitutional;

2. Enter a declaratory judgment that the school board regulation authorizing such a search is unconstitutional;

3. Preliminarily and permanently enjoin defendants, their agents, employees, successors and all persons in active concert or participation with them from

   (a) expelling plaintiff from school on the basis of any evidence discovered in the course of an illegal search or the fruits thereof;

   (b) expelling plaintiff from school without affording him procedural due process (See Wherefore Clause, paragraph 3(d)(ii), Model Pleading No. 1, or See Model Pleading No. 10.]

4. [Wherefore Clause, Paragraph 4(b), Model Pleading No. 1, p. 378, supra]

5. [Wherefore Clause, Paragraph 4(c), Model Pleading No. 1, p. 378, supra]

6. [Wherefore Clause, Paragraph 4(d), Model Pleading No. 1, p. 378, supra]

7. Grant such other and further relief as justice may require.

Adapted from the complaint in Smyth v. Lubbers, 398 F.Supp. 777 (W.D.Mich. 1975)(Clearinghouse No. 13,702)(dormitory search case)

Model Pleading No. 7

Pleading Challenging School Fees

[Alleging a violation of the State Constitution and the Fourteenth Amendment to the U.S. Constitution where a school district charges fees.]

1. [Identification of parties, jurisdiction, etc. Federal Court jurisdiction is based on 28 U.S.C. 1331, 1337, 1343; the claim arises under the Fourteenth Amendment, 42 U.S.C. 1983 and 1988; the Court is empowered to grant declaratory relief by 28 U.S.C. 2201 and 2202.]

2. [Statement of facts.]

3. [Class Action Allegation] The plaintiffs bring this action on behalf of themselves and all persons similarly situated. Plaintiffs represent a class of persons whose children attend ______________________________'s (defendant's) schools and are charged compulsory fees as an incident to attendance at school or as an incident to full access to [essential] educational benefits made available by the ________________________ (defendants). In addition, ____________________________, plaintiffs, who are too poor to pay fees, represent a separate class of persons whose children attend ___________________ ____________________'s [defendants'] schools and are financially unable to pay the fees and whose children have been denied benefits of the educational services offered by (defendants). Finally, plaintiffs ______________________________ (persons who have been penalized for failure to pay fees) represent a separate class of persons whose children have been penalized for their failure to pay fees. Plaintiffs ______________________________ are members of this latter group are too poor to pay fees.

The members of the respective class are so numerous that joinder of all members is impractical.

The question of law and fact under the Fourteenth Amendment to the United States Constitution are common to ______________________________ [plaintiffs too poor to pay fees] and the class of persons which they represent. The questions of law and fact under the state statutes are common to ______________________________ [plaintiffs whose children have been penalized] and the class of persons they represent. In addition, the claims of the named plaintiffs are typical of the claims of the class and they will fairly and adequately protect the interests of the class. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. The questions of law and fact common to the members of the class also predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

4. [Statement of Claims under the Federal Constitution, Equal Protection Clause] ______________________________ [plaintiffs too poor to pay fees] and the class of persons they represent are financially unable to pay the required fees. Defendants have singled out this class of persons and denied their children the full benefits of educational services made available to wealthier children by the defendants, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

[If there is an equal protection clause in the state constitution this should be contained in an additional cause of action similar to the above.]

5. [State action only; statement of claim under state constitutional provisions] [The sections requiring free schools or common schools, any sections which give children a right to education, and related statutory provisions should be cited; if a state constitution provides for common schools it should be also noted that "The courts have decided, and the original definition requires, that common schools be public schools which are free of all charges."]

The defendants' fees policy places a charge on a portion of the school system's educational services, which ______________________________ [applicable provisions of state laws of constitution] require[s] to be provided free of charge. In addition, the defendants' fees policy operates as an incidental charge, or admissions fee, for some students, and results in a denial of access to all educational benefits, which the ____________________ ____________ [state laws or constitution] require[s] be provided free of charge.

6. [State action only; statement of ultra vires claim] The defendants, as public officials, have only the power and authority expressly granted or fairly implied by the state legislature. The authority to charge school fees has not been granted. There is no statute expressly authorizing the fees policy and it cannot be fairly implied from other statutes which grant defendants authority. Therefore, the defendants' fees policy exceeds their statutory and is ultra vires.

7. WHEREFORE, on behalf of themselves and all others similarly situated, plaintiffs respectfully pray that this court:

(a) Enter a judgment that the defendants' fees policy violates the Fourteenth Amendment to the United States Constitution on its face and as applied; and preliminarily and permanently enjoin the defendants and their agents from requiring plaintiffs [names of those too poor to pay fees] and the class of persons they represent -- those who are financially unable to pay the required fees -- to pay school fees as a condition to receiving any element of the educational services offered by the defendants, or as an incident to attendance at any of the defendants' schools.

(b) [State action only] Enter a judgment that the fees policy violates the state constitution, sections __________ and permanently enjoin the defendants and their agents from requiring plaintiffs and the class of persons they represent to pay school fees for any element of educational services offered by defendants, or as an incident to attendance at school.

(c) [State action only] Enter a judgment that the fees policy and punishment thereto exceed defendants' statutory authority and permanently enjoin the defendants and their agents from punishing plaintiffs and the class of persons they represent.

(d) [Optional, depending on circumstances] Award damages to plaintiffs who have paid unauthorized and invalid fees since [September, 1970], valued at $ __________.

(e) Granting such other and further relief as the needs of justice may require.

Model Pleading No. 8

Pleading Alleging Sex Discrimination: Access to Courses

[Modified Copy of Petition for Writ of Mandate Filed in
Della Casa v. *Gaffney*, Civil No. 171673, Superior Court,
California, Nov. 8, 1972]

TO THE HONORABLE JUDGES OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF SAN MATEO:

ROSA DELLA CASA, petitioner herein, respectfully petitions for a Writ of Mandate and in support of said Petition alleges:

INTRODUCTION

I. This is an action to compel respondents to permit petitioner and similarly situated female students enrolled in the South San Francisco City High School to enroll in auto mechanics vocational courses offered to students at South City High School. Respondents have refused and continue to refuse to admit petitioner and other female students to enroll in said courses solely on the basis of their sex, in violation of state and federal constitutions, laws and regulations.

PARTIES

II. Petitioner is, and at all times mentioned herein was, a minor female of the age of 16 years and a student at the South City High School in the South San Francisco Unified School District.

III. JOSEPHINE DELLA CASA is the mother and duly appointed Guardian ad Litem of petitioner, by and through whom petitioner brings this action.

IV. Respondent THOMAS J. GAFFNEY is, and at all times mentioned herein was, Principal of the South City High School, charged with the following functions by 5 Cal. Admin. Code §5800(m):

> To serve, under the governing board . . .[or] superintendent of the district as chief executive officer of one or more schools, with total responsibility to manage all affairs of the school, including general control and supervision of all certificated and classified employees assigned to serve in the school.

V. Respondent PAUL NIELSEN is, and at all times mentioned herein was, Superintendent of the South San Francisco Unified School District, charged with the following functions by 5 Cal. Admin. Code §5800(a):

> Under the direction of a governing board to assume total responsibility under such board, to manage and direct all affairs of the school district, including general control of all certificated and classified employees of the district.

VI. Respondents LORRAINE COOPER, JAMES G. CHRISTENSEN, JOHN F. DILLON, LEO L. ESERINI, LEO PADREDDII are the duly elected members of the Board of Education of the South San Francisco Unified School District. The respondent BOARD OF EDUCATION is the statutory agency charged with the duty of operating public schools within its political jurisdiction, and promulgating necessary rules and regulations controlling student conduct, pursuant to §921 of the California Education Code.

VII. Respondent WILSON RILES is the Superintendent of Public Instruction, the Chief Executive of the California State Department of Education, and is charged, among other duties, with the duties of supervision and control over local school districts and boards of education and the enforcement of the federal and state laws, including the relevant requirements of the constitutions of the United States and of the State of California.

VIII. Petitioner does not at this time know the names or capacities of respondents DOES ONE through TWENTY, inclusive, and will amend this Petition as soon as said names and capacities are ascertained.

CLASS ACTION

IX. Petitioner brings this action individually and on behalf of all other similarly situated minor female students enrolled at South City High School who have been denied the right to enroll in automotive mechanics vocational courses solely on the basis of their sex. Said class members are too numerous to be named and brought before this Court as petitioners.

STATEMENT OF THE CASE

X. In April of 1972, when students at South City High School were signing up for fall semester courses, petitioner requested that she be admitted to Auto Mechanics I, the elementary auto mechanics vocational course offered by the South City High School. Petitioner was advised by her school counselor, Mrs. Bjorklund, that female students were not permitted to enroll in such classes because of their sex.

XI. Immediately thereafter, petitioner consulted with Mr. Tyler, head counselor at South City High School and Mr. Zaro, assistant principal of South City High School, and advised them of her desire to enroll in Auto Mechanics. Both Mr. Tyler and Mr. Zaro informed petitioner that female students would not be admitted to these classes because there was insufficient room to accommodate all the male students who desired to enroll in these classes. Petitioner inquired whether female students might be placed upon a waiting list for enrollment in auto mechanics courses and was advised that the school's policy was not to admit girls to auto mechanics courses.

XII. Petitioner thereupon circulated a petition signed by approximately forty female students enrolled at South City High School indicating that each such student was desirous of enrolling in Auto Mechanics I and requesting that they be permitted to enroll in such class irrespective of their sex. Said petition was presented to Mr. Tyler and Mr. Zaro.

XIII. Mr. Zaro advised petitioner that similar petitions had been presented to the school administration previously but that the policy was that girls would not be permitted to enroll in auto mechanics vocational classes.

XIV. Thereafter, petitioner contacted the ACLU of Northern California. On July 12, 1972, ACLU counsel wrote to respondent GAFFNEY on petitioner's behalf, calling his attention to criticism of sex discrimination in public schools by the Governor's Advisory Commission on the Status of Women in 1971. Said letter requested the petitioner to be permitted to enroll in Auto Mechanics. Copies of said letter were sent to respondents WILSON RILES and PAUL NIELSEN. A true and correct copy of said letter is attached to this Petition as Exhibit "A" and incorporated by reference as if fully set forth herein.

XV. On or about August 24, 1972, respondent GAFFNEY replied to the above mentioned letter. Respondent GAFFNEY justified his refusal to permit petitioner or other female students to enroll in Auto Mechanics courses on the grounds there was limited space available and that since auto mechanics is still a predominantly male occupation, male students must be given preference over female students. A true and correct copy of said letter is attached to this Petition as Exhibit "B" and incorporated by reference as if fully set forth herein.

CAUSE OF ACTION

XVI. As a direct and proximate result of the aforesaid conduct of respondents, petitioner is being denied an educational opportunity equal to that offered to her male counterparts at South City High School. This denial abridges petitioner's fundamental right to an education, and is the result of a sex based classification which violates petitioner's constitutional right to equal protection of the laws.

XVII. As a further direct and proximate result of the aforesaid conduct of respondents, Section 18 of Article XX of the California Constitution, §§1054, 5015, 6252 and 8376, and Title 5 §5480 of the California Administrative Code have been and are being violated.

XVIII. Petitioner has exhausted all informal means of reviewing respondents' policy and has no administrative remedies to exhaust.

XIX. Petitioner has no adequate remedy at law, in that respondents, unless the Court's writ issues as prayed, will continue to deny petitioner's admission into auto mechanics vocational courses.

WHEREFORE, Petitioner prays:

(1) After a hearing on her motion for a peremptory writ, a peremptory writ of mandate issue under the seal of this Court compelling respondents to permit petitioner and those similarly situated to enroll in Auto Mechanics I;

(2) For costs of suit herein; and

(3) For such other and further relief that the Court finds just.

COMPLAINT

Plaintiff complains of defendants as follows:

I. Plaintiff hereby re-alleges and incorporates by reference each and every allegation of Paragraphs I through XVIII, inclusive, of the foregoing Petition for Writ of Mandate, wherein plaintiff is referred to as petitioner and defendants are referred to as respondents.

II. An actual controversy exists, in that plaintiff contends that:

(a) The refusal to admit plaintiff and those similarly situated to auto mechanics vocational classes because they are female is a denial of plaintiff's fundamental right to an education, and a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and of Article I, §§11 and 21, and Article XX, §18 of the California Constitution.

(b) The refusal to admit plaintiff and those similarly situated to auto mechanics classes because they are female violates the provisions of California Education Code §§1054, 5015, 8376, 6252, and Title 5, §5480 of the California Administrative Code.

III. Plaintiff is informed and believes, so alleges, that defendants contend that their refusal to admit plaintiff and other female students to auto mechanics classes does not violate the Equal Protection Clause of the federal and state constitutions, or any other provisions of law.

IV. Plaintiff has no adequate remedy at law, in that defendants unless enjoined, will continue to deny plaintiff and other female students admission to auto mechanics vocational courses at South City High School.

WHEREFORE, plaintiff prays as follows:

(1) For a declaration that defendants' refusal to admit plaintiff and other female students to Auto Mechanics vocational courses violates the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, Article I, §§11 and 21, and Article XX, §18 of the California Constitution;

(2) For a declaration that defendants refusal to admit plaintiff and other female students to auto mechanics vocational course violates §§1054, 5015, 6252, and 8376 of the California Education Code, and 5 Calif. Admin. Code §5480.

(3) For an injunction enjoining respondents from refusing to admit plaintiff and those similarly situated to auto mechanics courses;

(4) For costs of suit herein; and

(5) For such other and further relief as the Court finds just.

Dated: November 11, 1972.

SUSANNE MARTINEZ
KENNETH HECHT
DOLORES A. DONOVAN
CHARLES C. MARSON
PETER E. SHEEHAN

By ______________________________
SUSANNE MARTINEZ

Attorneys for Petitioner/
Plaintiff

consent order favorable to
plaintiffs filed on April 11, 1973
(Clearinghouse Review No. 9308)

See also the Petition for Writ of Mandate in Seward v. Della, Civil No. 134173 (Calif.Super.Ct., Nov. 1972) (Clearinghouse Review No. 16,922).

Model Pleading No. 9

Pleading Alleging Violation of Substantive Due Process Challenging Surveillance

1. This is a civil class action to secure and protect rights of public school students, under the First and Fourteenth Amendments to the United States Constitution, to: (a) freedom of expression without the chilling suspicion that they are under surveillance by the police of ___________ when attending ______________ [defendant school]; (b) their right of privacy, freedom from governmental interference in essentially personal matters; and (c) freedom from arbitrary and unauthorized acts by city police and school officials. This is also a civil class action on behalf of tax payers in the city of ___________, ____________ who must support the illegal surveillance by police of students attending public schools therein. [optional for state-court cases, depending on state law on taxpayers' actions.]

2. [jurisdictional allegations; for federal cases see paragraph 2, Model No. 1, p. 375, supra]

3-6. [See paragraphs 3-6 of Model No. 1, at pp. 375-76, supra.]

7. By the acts and practices set forth in this complaint, the defendants and their predecessors, employees and agents have denied to plaintiffs, and the class of students plaintiffs represent, rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983, in numerous ways including the following:

(a) threatening to punish students for exercising their constitutional rights to freedom of expression and assembly;

(b) engaging in conduct having the effect of chilling the exercise of the constitutional rights to freedom of expression and assembly.

(c) deploying secret informers and undercover agents from the defendant police department, and registering these agents as students at defendant school, where they attend classes, public and private meetings, make reports to said police department of discussions taking place at said public and private meetings, and join student organizations at said school and report on the activities of said organizations.

(d) maintaining records and files, commonly designated as "police dossiers" containing information gathered through the above activities;

(e) including in said "police dossiers" information which pertains to no illegal activity or acts.

8. Unless enjoined by this Court, the defendants will continue to engage in practices the same as or similar to those alleged in this complaint, thereby irreparably injuring plaintiffs and the class of students which plaintiffs represent.

WHEREFORE, Plaintiffs on behalf of themselves and the class of persons they represent pray that this Court:

1. Order that this action be maintained as a class action pursuant to Rule 23, Federal Rules of Civil Procedure [for federal cases].

2. Enter a declaratory judgment that the acts and practices set forth in this complaint deny to plaintiffs and the class of persons plaintiffs represent rights under the First and Fourteenth Amendments to the United States Constitution [for federal cases].

3. Preliminarily and permanently enjoin the defendants, their agents, employees, successors and all persons in active concert or participation with them from:

(a) threatening to punish students for exercising their constitutional rights

(b) engaging in conduct having the effect of chilling the exercise of the constitutional rights to freedom of expression and assembly;

(c) deploying undercover agents at ______________ [defendant school];

(d) maintaining records and files ("police dossiers") on students and organizations associated with said school where said records and files do not pertain to illegal activity or acts;

(e) paying undercover agents for attending classes at and meetings of organizations associated with ___________________ [defendant school];

(f) permitting or ordering undercover agents from the police department of __________ to join organizations associated with ____________ [defendant school].

4. Preliminarily and permanently enjoin the defendant ________________ Police Department from expending or authorizing the expenditure of public funds of the

City of ________________, ______________ for the purposes of deploying undercover agents at the __________________ [defendant school], or to attend meetings of organizations associated with said school, or to maintain records and files on students or organizations associated with said school where said records or files do not pertain to illegal activities or acts.

5. Require in preliminary and permanent injunctions that defendants, their agents and employees take the following actions:

(a) Destroy all police records and files compiled on students and organizations associated with ____________________ [defendant school] which have been prepared with the assistance of information gathered through the illegal system of surveillance described in this complaint;

(b) expunge from police records of plaintiffs and all other persons similarly situated any information which does not relate to illegal activities or acts and which may have been obtained with the assistance of information gathered through the illegal system of surveillance described in this complaint;

(c) allow students and their parents to inspect all records, including the students' permanent records, necessary to insure that there has been compliance with paragraphs 5(a) and (6)..

6. Grant such other and further relief as the needs of justice may require.

[adapted from the taxpayer's complaint
in White v. Davis, Civil No. 0 32177,
(Super.Ct., Calif., June 14, 1972),
decided in favor of plaintiff taxpayer,
13 Cal. 3rd 757 (Cal.Sup.Ct. 1975), and
discussed at p. 32, supra (Clearinghouse
No. 16,923).

Model Pleading No. 10

Pleading Alleging Violation of Procedural Due Process

[Exact copy of the complaint filed in Goss v. Lopez, 419 U.S. 565 (1975)]

1. This is an action for injunctive and declaratory relief authorized by Title 42 U.S.C. Section 1983 to secure rights, privileges and immunities established by the First and Fourteenth Amendments to the Constitution of the United States.

JURISDICTION

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1343 (3) providing for original jurisdiction of this Court in suits authorized by Title 42 U.S.C. Section 1983. The court is empowered to grant declaratory relief by Title 28 U.S.C. Sections 2201 and 2202.

3. Plaintiffs respectfully request that a three-judge Court be convened pursuant to Title 28 U.S.C. Section 2281 in that plaintiffs seek to enjoin the enforcement of a State Statute by an officer of the State on the grounds that said statute and its implementation violate the Constitution of the United States.

CLASS ACTION

4. Plaintiffs bring this action on their own behalf and on behalf of all other students residing in the City of Columbus who are similarly situated and affected by the policy and usage complained of herein. The members of the class on whose behalf plaintiffs sue are so numerous as to make it impracticable to bring them all individually before this Court. There are common questions of law and fact involved and plaintiffs' claim is typical of the claim of the entire class. Plaintiffs fairly and adequately represent and will protect the interest of the class. Defendants have acted on grounds generally applicable to plaintiffs' class. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other

available methods for the fair and efficient adjudication of the controversy.

DEFENDANTS

5. Defendant Herbert W. Williams is and was at all times material hereto the Director of the Department of Pupil Personnel of the Columbus Public Schools.

6. Defendant Calvin Park is and was at all times material hereto the Principal and Chief Administrative officer to Central High School.

7. Defendant Philip F. Fulton is and was at all times material hereto the Principal and Chief Administrative officer of Marion-Franklin High School.

8. Defendant Frank D. Mason is and was at all times material hereto the principal and chief administrative officer of McGuffey Junior High School.

9. Defendant Harold H. Eibling is and was at all times material hereto Superintendent of Schools of the Columbus Public Schools and is the executive and administrative officer of the Columbus Board of Education pursuant to Section 3301.11 of the Ohio Revised Code.

10. The defendants [names], the members of the Columbus Board of Education are and were at all times material hereto entrusted with the management and control of all matters relating to the Columbus Public Schools pursuant to Chapter 3313 of the Ohio Revised Code.

CLAIM OF DWIGHT LOPEZ

11. Mrs. Eileen Lopez is the parent and natural guardian of Dwight Lopez, a minor, 19 years of age on whose behalf she has filed suit. Dwight Lopez is in the 12th grade at Central High School.

12. Lopez was suspended without prior hearing on the 26th of February by defendant Calvin Park, principal, Central High School. Lopez was advised of the suspension in writing by a letter mailed to him and received February 27, 1971. No return date was fixed in his suspension. On March 1, 1971 Mr. and Mrs. Lopez were advised that they would have to appear at the Board of Education before Dwight Lopez could return to school.

13. On March 5, 1971 the School Board acting through defendant Herbert M. Williams delivered a letter to Mr. & Mrs. Lopez advising them to appear March 8, 1971 at 8:30 A.M. Because of a demonstration being conducted at the Board of Education offices that morning neither Dwight or Mr. and Mrs. Lopez appeared at the Board as scheduled. No new date has been fixed for appearance before the Board. Dwight Lopez has not been advised of the complete and specific reasons for his suspension, and no hearing has been held concerning being re-

admitted to Central High School, and he is being denied an opportunity to continue his education there.

14. Following March 8, 1971 Mrs. Lopez called the School Board on several occasions, as did her daughter, Alma Robinson, but no new date was set for hearing. Mrs. Robinson thereafter wrote to the school Board on March 22, 1971 and by letter dated March 25, 1971 received March 26, 1971 from defendant, H.M. Williams, Mrs. Lopez was advised that since Dwight had missed his appointment March 8, 1971 and had made no attempt to make a new appointment, he was granted permission to report to the adult day school at Nelson Road.

15. To the date of the filing of this Complaint no hearing has ever been held in Dwight Lopez's case and he has not been advised in writing the reason for his suspension or expulsion from the regular day school of Central High School.

CLAIM OF BETTY JEAN CROME

16. Mrs. Martha Jean Adams is the parent and natural guardian of Betty Jean Crome, a minor, 13 years of age.

17. Betty Jean Crome was suspended from school by defendant Frank Mason, principal of McGuffey Junior High School. The plaintiff Betty Jean Crome was suspended from McGuffey Junior High School, where she is a student in the 7th grade on the 8th day of March, 1971 without prior hearing. Betty Jean Crome was advised that she was to report to school with her mother on March 15, 1971. Mrs. Adams was unable to be with her daughter on readmission however and that requirement was relaxed.

18. Betty Jean Crome was readmitted to school on the 15th day of March and no hearing was held on the reasons for suspension and said suspension has become part of her permanent school record.

CLAIM OF RUDOLPH R. SUTTON

19. Floyd Sutton is the parent and natural guardian of Rudolph Sutton, a minor 19 years of age on whose behalf he has filed suit. Rudolph Sutton is a student at Marion-Franklin High School in the 12th grade.

20. Rudolph Sutton was suspended from school on the 15th day of March, 1971 for a period of 10 days. By letter dated March 16, 1971 Rudolph Sutton was notified that he was suspended until March 25, 1971 and that the Pupil Personnel Department would notify him of further disposition of his case in a letter sent by Oscar Gill acting for the Defendant Fulton,

principal of Marion-Franklin High School.

21. No hearing was ever held in the Sutton case and on the 25th day of March upon returning to Marion-Franklin, Rudolph Sutton, and his mother who accompanied him, were advised that they would receive a letter in the mail concerning his case.

22. A letter dated that March 25, 1971 advised Mr. and Mrs. Sutton that their son was "to report to South High School for balance of 1970-71 school year. (adjustment)" The letter was signed by defendant H.M. Williams, Director Pupil Personnel. Plaintiff Rudolph Sutton has never requested a transfer from Marion-Franklin High School and no hearing or reason in writing were given to Sutton prior to said notice of transfer. Rudolph Sutton believes said suspension has become part of his permanent school record.

CLAIM OF TYRONE WASHINGTON

23. Mrs. Dollie Vance is the parent and natural guardian of Tyrone Washington, a minor 18 years of age on whose behalf she has filed suit.

24. Tyrone Washington on the 15th day of March, 1971 was a student at Marion-Franklin High School from which he was suspended for a period of ten days. In a letter dated March 16, 1971 the parents of Tyrone Washington were advised of the suspension and that "The Pupil Personnel Department of the Columbus Board of Education will notify you concerning a disposition of your case." No hearing was held prior to or subsequent to suspension.

25. By letter dated March 23, 1971 Tyrone Washington's parents were notified that he had been summarily transferred to Mohawk Junior High School for the balance of the school year. No transfer had been requested and no hearing has been held concerning said transfer. Tyrone Washington believes said suspension and transfer has become a permanent part of his school record.

CLAIM OF SUSAN C. COOPER

26. Mrs. M. Katherine Cooper is the parent and natural guardian of Susan C. Cooper, a minor 16 years of age on whose behalf she has filed suit. Susan C. Cooper is a student at Marion-Franklin High School.

27. Susan Cooper was suspended from school without prior hearing for a period of ten days on March 15, 1971. On March 17, 1971 Mrs. Katherine Cooper received a letter from Oscar R. Dill acting on behalf of the defendant Fulton, principal of Marion-Franklin High

School. No hearing was held prior to March 25, 1971 concerning said dismissal. By letter of March 16, 1971 Mrs. Cooper was advised of an 11:00 A.M. conference in Mr. Gill's office on the date of Susan's return. Susan Cooper believes said suspension will become part of her permanent record.

CLAIM OF DEBORAH KAY FOX

28. Mrs. Delores Young is the parent and natural guardian of Deborah Kay Fox, a minor 16 years of age on whose behalf she has filed suit. Deborah Kay Fox is a student at Marion-Franklin High School in the 10th grade.

29. On the 10th day of March, 1971 Deborah Kay Fox was suspended from school without prior hearing for a period of ten days. On the 11th day of March, 1971 Mr. and Mrs. William Young were advised of the suspension of Deborah Kay Fox until Friday March 19, 1971. On March 19, 1971 when she attempted to return to school, Deborah Kay Fox was suspended until March 19, 1971 or "until contacted by Mr. Robert Carter or his representative regarding your daughter's school placement". Miss Fox was advised personally by Mr. Kollmer, as agent for the defendant Fulton that she was not to return to Marion-Franklin.

30. No hearing has ever been held concerning said suspension and neither Deborah Kay Fox or her parents have ever requested a transfer. Miss Fox believes the suspensions she has received have become a permanent part of her school record. Miss Fox was advised on March 29th that she has been transferred to South High School.

CLAIM OF CLARENCE L. BYARS

31. Mrs. Barbara Byars is the parent and natural guardian of Clarence L. Byars, a minor 16 years of age. Clarence L. Byars is in the 11th grade at Marion-Franklin High School.

32. On the 15th of March, 1971, Clarence L. Byars was suspended from school for a period of 3 days. On the 17th day of March, 1971 the parents of Clarence L. Byars were advised that Clarence was suspended and that he was to return to school on the 18th day of March 1971. No hearing was held prior to his suspension and Clarence Byars was not informed in writing of the reasons for his suspension until two days after it occurred and was never given an opportunity to contest said suspension. Clarence L. Byars believes said suspension will become part of his permanent school record.

CLAIM OF CARL SMITH

33. Mrs. Veda Smith is the parent and natural guardian of Carl Smith, a minor, 18 years of age on whose behalf she has filed suit. Carl Smith is a student in the 12th grade at Central High School. Carl Smith was suspended from Central High School by the defendant Calvin Park, principal, on the 26th day of February, 1971. Smith was advised of suspension on February 27, by letter. No definite date of return was given to the plaintiff Smith and he has been permitted to be in school only on one day since his suspension, March 9, 1971. Smith has been advised that he may not return to school until he talks to someone at the School Board. No hearing has been held in his case since suspension February 27, 1971. Carl Smith continues to be denied an opportunity to complete his schooling.

CLAIM OF BRUCE HARRIS

34. Freddie Robinson is the legal guardian and next friend of Bruce Harris on whose behalf he has filed suit. Bruce Harris is a minor, 18 years of age and a student in the 12th grade at Marion-Franklin High School.

35. On the 22nd day of March, 1971, Bruce Harris was suspended from Marion-Franklin High School by Oscar Gill, Assistant Principal. No hearing was held prior to his suspension and Harris was advised of the suspension by letter received March 24th, 1971. The letter advised Harris he was suspended until March 30, 1971 and that during the suspension "the Pupil Personnel Department of the Columbus School Board will review with you the contents of the letter of November 6, 1970".

36 When Harris returned to school on March 30, 1971, he was not readmitted and advised to make contact with the Pupil Personnel Department.

37. Harris remains out of school and believes said suspension will become part of his school record.

38. Defendants have acted pursuant to Section 3313.66 of the Ohio Revised Code, the Administrative Guide of the Columbus Public Schools, and the Policy Statement in Discipline of the Columbus Public Schools, none of which provides any standards for the exercise of school administrators' disciplinary authority or fair proceedings through which a student has an opportunity to challenge the proposed disciplinary measure.

39. On information and belief, there are no other school rules or regulations relied upon by defendants as authorized aforesaid disciplinary actions.

40. Under color of State law Defendants have acted intentionally, deliberately, and knowingly in violation of the First and Fourteenth Amendments to the Constitution of the United States and Title 42 U.S.C. Section 1983, rendering defendants liable to plaintiffs in law and equity.

CAUSE OF ACTION

41. Section 3313.66 of the Ohio Revised Code, Section 1010.04 of the Administrative Guide of the Columbus Public Schools, and the Columbus Policy Statement in Discipline provide no ascertainable standards of conduct for violation of which high school students may be suspended and expelled. Said statute, Administrative Guide, and Policy Statement are unconstitutional because their vagueness and overbreadth deprive students of rights secured under the First and Fourteenth Amendments to the Constitution of the United States.

42. Section 3313.66 of the Ohio Revised Code, Section 1010.04 of the Administrative Guide of the Columbus Public Schools, and the Columbus Policy Statement in Discipline authorize the suspension and expulsion of high school students without prior notice and a hearing with such minimal rights as a written statement of the reasons for the proposed discipline, the right to cross-examination, the right to pre-hearing discovery procedure, the right to submit relevant evidence and the right to be represented by counsel. Said statute, Administrative Guide, and Policy Statement are unconstitutional because their lack of procedural safeguards deprives students of rights secured under the Fourteenth Amendments to the Constitution of the United States.

43. In the instant case defendants have effected suspensions, expulsions, and involuntary transfers of students without prior hearings which comport with minimal standards of due process. Defendants actions have been arbitrary, unequal and discriminatory in violation of plaintiffs' rights secured by the First and Fourteenth Amendments to the Constitution of the United States.

PRAYER FOR RELIEF

44. Wherefore, plaintiffs respectfully pray that this Court:

(1) Assume jurisdiction of this cause and convene a three-judge district Court to determine the controversy pursuant to Title 28 U.S.C. Section 2281./

(2) Enter a preliminary and a final order pursuant to Title 28 U.S.C. Sections 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that Section

3313.66 of the Ohio Revised Code is unconstitutional.

(3) Enter a preliminary and a final order pursuant to Title 28 U.S.C. Sections 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the administrative Guide and the Policy Statement on Discipline of the Columbus Public Schools insofar as they relate to suspensions and expulsions are unconstitutional.

(4) Issue a preliminary and a permanent injunction restraining the defendant, their successors in office, agents and employees from further enforcement of the unconstitutional provisions of their discipline policy and Section 3313.66 of the Ohio Revised Code.

(5) Issue a preliminary and a permanent injunction ordering that plaintiffs' school records be expunged of any notation of the aforementioned suspensions and that plaintiffs be allowed to make up any school work or tests occurring during their absence from school.

(6) Maintain jurisdiction of this cause until such time as defendants establish a hearing procedure in conformity with the requirements of the Fourteenth Amendment to the Constitution of the United States.

(7) Award plaintiffs their costs and disbursements incurred herein together with such further alternative relief as may seem just and equitable.

Motion for a Temporary Restraining Order

Upon the complaint and [illegible] affidavits attached hereto, the plaintiff hereby moves this Honorable Court for a Temporary Restraining Order, enjoining the defendants, their agents, employees, successors and those acting in concert with them from:

(1) Prohibiting plaintiff from distributing in school and on school grounds leaflets and other printed material expressing views on political and other matters of public concern;

(2) Punishing and threatening to punish students for exercising their constitutional rights to free expression.

In support of this motion, plaintiff alleges:

(1) There is a substantial likelihood that the relief sought in his complaint for a permanent injunction will be granted.

(2) Plaintiff is suffering and will continue to suffer irreparable harm unless the Court grants the temporary injunction herein requested.

(3) The imperative public interest in freedom of expression supports plaintiff's prayer for a preliminary injunction.

(4) The issuance of a preliminary injunction will not cause undue inconvenience or loss to the defendants but will prevent irreparable injury to the plaintiff.

Plaintiff further requests a prompt and speedy hearing on this motion, to be scheduled as soon as practicable, and before [date requested]. Such a hearing is desirable because plaintiff will suffer irreparable injury if he is not assured of his constitutional right of free speech. Plaintiff estimates that twenty minutes will be needed for oral argument.

Model Pleading No. 12

Motion for Restraining Order Pending Appeal

The plaintiff hereby respectfully requests the U.S. Court of Appeals, ________ Circuit, to enjoin defendants, pending appeal, (a) from barring plaintiff from distributing in school and on school grounds leaflets and other printed material expressing views on political and other matters of public concern and (b) from punishing and threatening to punish students for exercising their constitutional rights to free expression.

In support of this motion plaintiff alleges that:

(1) There is a substantial likelihood that the relief sought in his complaint for a permanent injunction will be granted.

(2) Plaintiff is suffering and will continue to suffer irreparable harm unless the Court grants the injunction herein requested.

(3) The imperative public interest in freedom of speech supports plaintiff's prayer for a preliminary injunction.

(4) The issuance of a preliminary injunction will not cause undue inconvenience or loss to the defendants but will prevent irreparable injury to the plaintiff.

These allegations are supported by the verified complaint and the affidavits submitted in support of plaintiff's motion for a temporary restraining order. The complaint, motion for a temporary restraining order and affidavits are attached hereto and made a part of this motion.

Pursuant to Rule 8 of the Rules of Appellate Procedure, plaintiff, at the hearing on [date], first applied to the district court for a restraining order pending appeal, and it was denied.